S. HRG. 101-147

BUY INDIAN ACT AMENDMENTS OF 1989

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 321

TO REVISE PROVISIONS OF LAW THAT PROVIDE A PREFERENCE TO INDIANS

MAY 11, 1989 WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE

98-365 WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S411-22

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BUY INDIAN ACT AMENDMENTS OF 1989

THURSDAY, MAY 11, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m. in room 485 Russell Senate Office Building, Hon. Kent Conrad (acting chairman of the committee) presiding.

Present: Senators Conrad and Cochran.

Staff present: Alan Parker, Craig Obey, Dan Lewis, Bob Arnold, Kathleen Hooker, Eric Eberhard, Sara Yager, Dale Lloyd, Mary Jo Vrem, Steve Heeley, and Roy Atwood.

STATEMENT OF HON. KENT CONRAD, U.S. SENATOR FROM NORTH DAKOTA

Senator CONRAD. We will open the hearing before the Senate Select Committee on Indian Affairs.

Good afternoon. On behalf of my colleagues on the Select Committee on Indian Affairs, I would like to welcome everyone to today's hearing.

There are two laws that authorize Indian preference in contracting: the Buy Indian Act and Section 7(b) of the Indian Self-determination Act. The purpose of these laws is to help spawn economic development in Indian country and to provide opportunities for Indian enterprises and Indian people. However, the potential for Indian preference laws to spur economic development has never been fully realized.

I recently joined the Chairman, Senator Inouye, along with several of my other colleagues on the Select Committee on Indian Affairs in introducing S. 321, the Buy Indian Act Amendments of 1989, which is, of course, the subject of today's hearing. The amendments update, revise, and consolidate the existing Federal laws on Indian preference in contracting.

One of the most important issues confronting Indian reservations is economic development. Job opportunities on and around the reservation are a critical component of any effort to improve the social and economic well-being of Native Americans. Joblessness only exacerbates problems of alcoholism, suicide, and other family and social problems that plague our Indian reservations. And in many ways, jobs are the solutions.

The Buy Indian Act is only one tool to help Indian businesses, but it is an important one. We must be certain that it provides Indian businesses with the kind of help that they need to thrive

and provide economic opportunity for Native Americans. S. 321 is an attempt to do just that.

A variety of criticisms are often made of Indian preference laws, among them the failure to set clear goals, the lack of consistent implementation, and the prevalence of "front" organizations which take unfair advantage of preference contracting.

S. 321 attempts to address these problems in a number of ways. It clarifies the goals of Congress in enacting Indian preference laws; it consolidates current laws and broadens the scope of their applicability, and; it helps ensure that front organizations will be prevented from siphoning off resources that are badly needed in Indian country.

S. 321 does not necessarily represent the ideal legislative product. In fact, a number of amendments have already been suggested. The purpose of today's hearing is to determine just how effective the current bill will be at improving the law, and where additional changes should be made.

[Text of S. 321 follows:]

II

101ST CONGRESS
1ST SESSION

S. 321

To revise provisions of law that provide a preference to Indians.

IN THE SENATE OF THE UNITED STATES

JANUARY 31 (legislative day, JANUARY 3), 1989

Mr. INOUYE (for himself, Mr. MCCAIN, Mr. BURDICK, Mr. CONRAD, and Mr. COCHRAN) introduced the following bill; which was read twice and referred to the Select Committee on Indians Affairs

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A BILL

To revise provisions of law that provide a preference to Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be referred to as the "Buy Indian Act Amendments of 1989".

FINDINGS

SEC. 2. (a) The Congress, after careful review of the economic conditions on Indian reservations, and the historical and special legal relationship of the Federal Government with Indian people, finds that—

(1) economic self-sufficiency is an essential element in achieving self-determination by Indian tribes and Indian people;

(2) increased Indian employment and business opportunity is a critical element in the elimination of the poverty, alcoholism, high suicide rates, substandard housing, and other problems that are the focus of many of the Federal programs serving Indians;

(3) the funds spent by the United States on reservations or otherwise spent for the benefit of Indians need to be utilized, not only to purchase goods and services but, to the maximum extent feasible, to promote Indian employment and business opportunities;

(4) the awarding of a preference in training, employment, contracting, and subcontracting opportunities has proven to be an exceptionally effective means of ensuring that Indians receive the maximum benefit from Federal funds appropriated on their behalf;

(5) the existing Federal laws on Indian preference in contracting need to be updated, revised, and consolidated to include appropriate recognition of tribal laws that establish preference programs for tribal members; and

(6) companies and individuals that seek to take improper advantage of Indian preference opportunities

do not contribute to Indian economic development and damage the credibility of Indian preference programs.

(b) The Congress declares that—

(1) a major national goal of the United States is to ensure that the procurement of goods and services on Indian reservations or otherwise for the benefit of Indians shall be carried out in a manner that achieves the maximum benefit for Indian employment and business development; and

(2) a secondary but essential goal is to prevent and prohibit companies from misusing Indian preference programs.

BUY INDIAN ACT AMENDMENTS

SEC. 3. Section 23 of the Act of June 25, 1910 (36 Stat. 861; 25 U.S.C. 47) is amended to read as follows:

"SEC. 23. (a) So far as may be practicable, Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market, in the discretion of the Secretary of the Interior.

"(b)(1) Any contract or subcontract entered into under, or any grant or subgrant provided under, the Indian Self-Determination and Education Assistance Act, the Act of April 16, 1934 (48 Stat. 596; 25 U.S.C. 452, et seq.), or any other Act authorizing Federal contracts with, or grants to, Indian organizations or contracts or grants for the benefit of Indians shall require that, to the greatest extent feasible—

"(A) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be accorded to Indians, and

"(B) preference in the awarding of subcontracts and subgrants in connection with the administration of such contracts or grants shall be accorded to Indian organizations and to Indian-owned and Indian-controlled enterprises.

"(2)(A) If—

"(i) a procurement activity to which the preferences described in paragraph (1) apply is to take place on a reservation of an Indian tribe, and

"(ii) the governing body of the Indian tribe has—

"(I) imposed preferences generally comparable to those imposed by this subsection, and

"(II) established a tribal office to enforce those preferences,

then, upon the request of the governing body of the Indian tribe, the subcontracting and employment preference requirements imposed by the Indian tribe shall be applicable to the procurement activity in lieu of the preferences established by the Federal agency and the tribal office shall have primary responsibility for enforcing the subcontracting and employment preferences in that procurement activity.

"(B) Subparagraph (A) shall not apply if the Federal agency involved in the procurement activity has made a determination that the preferences imposed by the Indian tribe are not generally comparable to those provided by this section or that the tribal office—

"(i) is incapable of enforcing the preferences, or

"(ii) is failing to meet its responsibilities to the extent that the rights of Indian employees or enterprises provided for in this subsection are being seriously jeopardized.

"(c)(1) Each Federal agency administering funds appropriated for the benefit of Indians shall provide a preference for Indian-owned and Indian-controlled enterprises in the award of any contract in which 51 percent or more of the contract funds were appropriated to be used for the benefit of Indians, including but not limited to contracts for construction. This preference shall have priority over all other Federal procurement preferences.

"(2) The Secretary of the Interior may authorize preferences in the award of contracts described in paragraph (1) by any Federal agency, upon the request of that agency, if the Secretary of the Interior believes the preferences will help to fulfill the special responsibilities of the Secretary of the Interior toward Indians.

"(3) For purposes of this section, contract funds are to be used for the benefit of Indians if—

"(A) the contract furthers the special relationship between the United States and Indians,

"(B) Indians are the primary beneficiaries of the contract, or

"(C) the majority of the contract activity takes place within the exterior boundaries of an Indian reservation.

"(4)(A) A Federal agency shall implement the preference provided under this subsection by limiting the competition for the awarding of a contract to Indian-owned and Indian-controlled enterprises if—

"(i) two or more Indian-owned and Indian-controlled enterprises are ready, willing, and able to perform the contract, or

"(ii) only one known Indian-owned and Indian-controlled enterprise is available and the agency has a method to determine the responsibility of such enterprise and the reasonableness of the bid or proposal submitted by such enterprise for the contract.

"(B) Limited competition among only Indian-owned and Indian-controlled enterprises shall be utilized to the greatest extent feasible in the awarding of contracts described in paragraph (1).

"(5) If it is not feasible for a Federal agency to limit the competition for the award of a contract described in paragraph (1), the agency shall award the contract after full and open competition. In such case, the contract shall be awarded to any responsible Indian-owned and Indian-controlled enterprise submitting the lowest bid that does not exceed the lowest bid submitted by any other responsible bidder by a percentage (not to exceed 10 percent) prescribed by the head of the Federal agency in regulations. If a factor other than price is determinative in the award of the contract, the Federal agency shall utilize a comparable method to provide a preference to Indian-owned and Indian-controlled enterprises in the selection process.

"(6) The preference requirements of this subsection may be waived only upon extraordinary circumstances and only by an official having authority over the procuring agency that is comparable to the rank of an assistant secretary of a Federal department. Each Federal agency subject to the provisions of this subsection shall, at the beginning of each fiscal year, prepare a procurement schedule that will enable the Federal agency to advertise, to the maximum extent possible, the contracts to which this section applies at a date sufficiently in advance of the date performance must begin under the contract to permit a subsequent open market advertisement of

the contract if the contract cannot be awarded under the limited competition provision of this subsection.

"(d)(1)(A) Notwithstanding any other provision of law, an enterprise shall be eligible for the preferences provided in subsections (b) and (c) only if the enterprise is an Indian-owned and Indian-controlled enterprise.

"(B) For purposes of this section—

"(i) The term 'Indian-owned enterprise' means—

"(I) an enterprise engaged in construction (within the meaning of the Indian Self-Determination Act) which is entirely owned by Indians who receive 100 percent of the profits of the enterprise, or

"(II) an enterprise engaged in any business other than construction, at least 51 percent of which is owned by Indians who receive not less than 51 percent of the profits of the enterprise.

"(ii) The term 'Indian-controlled enterprise' means an enterprise, one or more of the Indian owners of which is the chief executive officer of the enterprise and has the experience and training to manage, and does in fact manage, the day-to-day activities of the enterprise.

"(2) No Federal agency shall, in awarding a contract or subcontract, extend a preference provided under this section

to an enterprise which has been denied by the Advisory Committee on Indian Preference certification of eligibility to receive such preference.

"(3) Any Indian-owned and Indian-controlled enterprise that is certified by the Advisory Committee on Indian Preference as eligible for the preferences provided under this section and is not engaged in construction activities may enter into joint ventures with other enterprises that are not eligible for such preferences and shall remain eligible for preferences under this section so long as the Indian-owned and Indian-controlled enterprise owns and controls at least 51 percent of the joint venture, but shall not remain eligible for such preferences if—

"(A) the Indian-owned and Indian-controlled enterprise enters into more than two of such joint ventures, or

"(B) the other enterprise involved in the joint venture that is not eligible for such preferences has participated in more than two of such joint ventures.

"(e) Each Federal agency engaged in substantial contracting for the benefit of Indians shall establish and implement such regulations, policies, monitoring systems, and enforcement systems as may be necessary to ensure full compliance with the requirements of this section. Such implementation shall be done in a manner that promotes maximum con-

sistency and coordination among the affected agencies and promotes the maximum participation of Indian tribes.

"(f)(1) There is hereby created an Advisory Committee on Indian Preference.

"(2) The Advisory Committee on Indian Preference shall consist of the following 10 members:

"(A) the Assistant Secretary of the Interior for Indian Affairs, or a delegate of the Assistant Secretary,

"(B) the Director of the Indian Health Service of the Department of Health and Human Services, or a delegate of the Director,

"(C) the Administrator of the Small Business Administration, or a delegate of the Administrator,

"(D) the Assistant Secretary of Commerce for Economic Development, or a delegate of the Assistant Secretary,

"(E) the Secretary of Defense, or a delegate of the Secretary of Defense,

"(F) the Assistant Secretary of Housing and Urban Development for Public and Indian Housing, or a delegate of the Assistant Secretary, and

"(G) 4 individuals appointed by the Secretary of the Interior who represent Indian tribes or the Indian business community.

"(3) The Advisory Committee on Indian Preference shall—

"(A) develop and publish a set of criteria for certifying enterprises as eligible for the preferences provided under this section,

"(B) review applications for certification from Indian-owned economic enterprises,

"(C) certify those enterprises that satisfy the criteria,

"(D) promote uniformity of regulation and enforcement of the preferences established under this section by Federal agencies and Indian tribes, and

"(E) develop and assist the Federal agencies in implementing a program to ensure that Federal funds expended for the benefit of Indians also assist, to the maximum extent feasible, in the promotion of Indian economic development.

"(4)(A) The Advisory Committee on Indian Preference may employ staff and use experts from within and without the Federal Government to assist the Committee in carrying out its responsibilities.

"(B) The Secretary of the Interior shall be responsible for coordinating the establishment of the Advisory Committee on Indian Preference and providing staff to the Committee. The Secretary of the Interior may enter into contracts with

nonprofit Indian organizations to provide support services to the Committee.

"(5) There are authorized to be appropriated for each fiscal year $500,000 to carry out the provisions of this subsection.

"(g) For purposes of this section, the terms 'Indian' and 'Indian tribe' have the respective meaning given to each of such terms under section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).".

Senator CONRAD. To help us with our task today, we will hear from several witnesses. We will begin with the Honorable William P. Ragsdale, Acting Assistant Secretary for Indian Affairs.

Today's second panel will consist of Mr. Edward Danks, President of the National Indian Contractors Association; Mr. Jefferson Begay, the President of Amerind Construction; and Mr. Richard Coando, Chairman of the Board of the Council on Tribal Employment Rights Organization.

Finally today, we will hear testimony from Mr. William Richardson, the Director of the Office of Economic Development for the Mississippi Band of Choctaw Indians, and Mr. George Bennett from the American Indian Business Development Consortium.

The committee looks forward to hearing your testimony here today.

With that, we would like to begin with the Honorable William Ragsdale, the Acting Assistant Secretary of the Bureau of Indian Affairs. Welcome.

[Prepared statement of Senator Conrad appears in appendix.]

STATEMENT OF HON. WILLIAM P. RAGSDALE, ACTING ASSISTANT SECRETARY, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY DON ASBRA, CHIEF, DIVISION OF CONTRACTING AND GRANTS ADMINISTRATION, BUREAU OF INDIAN AFFAIRS; ED WILES, ATTORNEY, OFFICE OF SOLICITOR, DEPARTMENT OF THE INTERIOR; REGINALD ARNOLD, LOAN SPECIALIST, BUREAU OF INDIAN AFFAIRS

Mr. RAGSDALE. Good afternoon, Mr. Chairman. We're pleased to be here. I'm Pat Ragsdale.

First of all I'd like to make some introductions, Mr. Chairman. To my right is Mr. Ed Wiles, from the Office of the Solicitor, Department of the Interior. To my left sits Mr. Don Asbra, the Chief of our Contracting Office for the Bureau of Indian Affairs, and to his left is Mr. Reginald Arnold from our Credit and Financing Office, to assist in responding to any questions concerning bonding of contractors and procedures and so forth.

If I may have my full statement entered into the record, I will just summarize my testimony, Mr. Chairman.

Senator CONRAD. That would be fine.

Mr. RAGSDALE. Thank you.

Mr. Chairman, contracting with Indian economic enterprises represents one way that the Government can help alleviate the widespread unemployment and underemployment that is common to many Indian reservations. The Act of June 25, 1910, which is commonly referred to as the Buy Indian Act, has been used in the past to provide employment opportunities. However, the original purpose of the law is somewhat difficult to discern. And it has been the subject of litigation and debate. As a consequence, modern legislation is needed to define public policy which takes into consideration the situation that exists today, not the situation that may have existed in 1910. For this reason, S. 321, if amended as we suggest, could fulfill this need.

Therefore, I recommend enactment of S. 321 with the amendments described in my full statement.

I'd like to take this opportunity also to make a few additional comments. I am well aware of what appears to be a growing perception on the part of the public that set-aside programs, in general, and those aimed at alleviating the economic plight of minority people in particular, are subject to fraud, waste and abuse. Certainly, I cannot dispute that there have been instances reported throughout the Federal Government that would lend credence to such feelings. Although I have not concluded with certainty that the situation is as bad as one might conclude from the case work identified in the media, I am sensitive, as I know the committee is, to the impact of the public perception on our current public policy and realize that it is incumbent on both the Congress and the Executive Branches to ensure minority contracting processes are regulated and policed properly.

The concept of a compliance office within the Federal system rather than an advisory committee on Indian preference would be, in my opinion, the most effective way to address the potential abuse and enforce compliance.

In addition, we believe strongly that having prospective Buy Indian contractors certify themselves and relying on the other Indian contractors to police the truth of the certifications through the bid protest procedure is an effective measure. It is for this reason that we would support establishing a mechanism to scrutinize applications, investigate irregularities and take appropriate action.

However, we feel this could be accomplished more efficiently and effectively if a small office staff with an appropriate mix of contracting, and legal and investigative skills vested with needed legal authority, were established. Among other things, the office would need the authority to issue subpoenas, and to refer cases to the Department of Justice, which were deemed appropriate. Where the office is located, in my opinion, is not the primary issue. It might be best lodged in the Office of Procurement Policy under the Office of Management and Budget, or with some lead agency of the Federal Government, such as the Department of the Interior or SBA, or someplace else. The key to the success of such an office would be the authority vested in it, and the dedication of that particular office to conscientiously inspect, investigate and close in on allegations that are supported by reasonable evidence.

In closing I would like to say that it should be recognized by all that the purpose of minority contracting, at least in Indian country, is intended to serve a number of objectives which on balance are cost effective in terms of providing employment opportunities, promoting business development, and most importantly, completing the job that is to deliver contracted services or products in a reasonably cost-effective way. If this is the intent of Congress, it should be understood that it will not necessarily be the cheapest form of providing the contracted service.

We look forward to answering the questions the committee may have. Thank you, Mr. Chairman.

[Prepared statement of Mr. Ragsdale appears in appendix.]

Senator CONRAD. Thank you, Mr. Ragsdale. I appreciate very much you being here today, and providing the testimony that you have.

The reason S. 321 currently has a hundred percent Indian ownership requirement is to discourage fronting. However, you seem to prefer, in your written testimony, a 51 percent requirement. Could you please elaborate on your reasons for the 51 percent requirement?

Mr. RAGSDALE. Well, the premise for the 51 percent requirement came about during the last Administration when the former Assistant Secretary, Ross Swimmer, had some rather strong feelings about that when he came on board. And he worked with our Contracting Office, prior to my coming into Washington a couple of years ago, to incorporate this concept in the proposed regulations to implement the current Buy Indian Authority.

It was his feeling, and I must say that I tend to agree not having heard the arguments to the contrary, except for the problem in regulating, that to insist on 100 percent ownership denies Indian businesses the opportunity to go into joint venture-type arrangements. And it was Mr. Swimmer's belief, and I tend to believe as well, that one of the biggest problems with Indian businesses is that they are undercapitalized and often lack management expertise. And that the 51 percent requirement would achieve a balance that would promote Indian business and economic development and fulfill that purpose.

I recognize, particularly after the scrutiny of the Special Subcommittee on Investigations, that is more difficult to regulate than to ensure that you do not have front organizations.

Senator CONRAD. How do we guard against fronting? Any thoughts on that problem?

Mr. RAGSDALE. Well, I'll let Mr. Asbra talk about that in a little more detail, but a balance of what we're suggesting and what I have proposed, even though the regulations have never been promulgated, is that we have a strong self-certification process which allows Indian businesses to challenge people's credentials, and provides a due process for review of the certification, is the first and the most effective way to do that. The competitive process will naturally draw out and allow other businesses to challenge certification.

But I also believe that we do need an additional mechanism within the Federal system, as I suggested in my previous testimony, that would ensure compliance, that contractors throughout the Nation that were exercising, or had Indian preference, and enjoyed that preference for minority contracting purposes, could have some feeling that someone was going to come in and do a detailed review of their certification and of their practices, and with some additional authorities that we currently do not have, nor does the Inspector General have, as I understand it, and that is to subpoena records. That this office should have some extraordinary authorities and responsibilities to conscientiously spotcheck and review credentials and investigate complaints.

I think, on balance, if you had those two processes in place that that would achieve that purpose.

Senator CONRAD. Let me understand. I take from your testimony and what you've just said, as well, that you appear to favor a continuation of the current self-certification process. Is that where you're coming down? I hear you talking about the right to challenge company's certification, but we'd still have basically a self-certification process, is that your intention?

Mr. RAGSDALE. That is essentially correct. And the regulations that have been drafted, but never promulgated, provides a fairly comprehensive process for allowing for self-certification and for challenge and so forth.

Senator CONRAD. Why haven't those regulations been promulgated? Were there public comment and controversy over them, or what is the reason?

Mr. RAGSDALE. Well, basically its the process itself of getting out regulations. When I came to Washington two years ago, the regulations that were pretty much, as far as I was concerned, in final, it takes quite a while to go through the regulations. But the time that it passes back and forth between our attorneys and the Office of Management and Budget for fine tuning and so forth, we haven't been able to get them out.

Also, members of this committee, about the time that the Subcommittee on Investigations got involved in the review of minority contracting expressed some concerns about the proposed regulations, and have asked us to hold back. And I think that as a result of that there's been additional reluctancy within the Department of the Interior to go ahead and move forward on those rules.

Senator CONRAD. How much would an office of this nature cost? I notice that you've got $500,000 provided for—or the bill provides for $500,000. Is that adequate in your judgment?

Mr. RAGSDALE. We have really not made an assessment on that. I don't know where the committee got its basis for making its estimate on the advisory body, but I think that you could assume that the half million dollars for the advisory body was presumed to be adequate, I think that you could, with the dedication of staff specifically charged with carrying out that purpose, that a half a million dollars would go a lot further to actually regulate, review and evaluate certification and Buy Indian contractors, than the establishment of an advisory body.

The problem with advisory bodies, Mr. Chairman, in my opinion, is that you have a number of high profile, high level positions, or people identified, that gives it some status, but the practical matter is that secretaries and assistant secretaries are not going to be able to devote the kind of time and attention to that function. And a lot of disorganization occurs, in my opinion, when you have that kind of a committee set up.

Senator CONRAD. All right. I very much appreciate your testimony.

I'd like to raise another unrelated matter with you, if I might, that's come to my attention. We have a situation in North Dakota where certain members of the Turtle Mountain Tribe are receiving per capita distributions. And we have a very unusual situation in which there are two people with precisely the same name, same middle initial, and one person got two per capita payments. The other person got none.

And now the BIA is taking the position that they have to get the money back from the person that got two payments before they can make the payment to the other person who should have gotten their own payment in the first place. You can imagine the sort of consternation that creates.

And I understand you've got escrow funds or the settlement money that's specifically designated for others, and taking that money to pay the person who should have gotten paid in the first place may create a problem. But I'm wondering if there's not some creative solution to this in terms of an alternative fund of some kind that can be drawn from, because what we have now is a person who should have received their money initially, through no fault of that person, another person got their money because of the identical name, and now the person who has not received their money is left out there waiting for the collection back from the person who got the overpayment.

And I'm wondering if there's not some creative solution that we could arrive at that would allow the person who has a right to that money to get it, regardless of what happens with the recollection?

Mr. RAGSDALE. I would agree, that's not hardly fair. I'll see if we can't come up with a solution to that. I don't see why we can't. At an earlier time in my career I used to work on per capita payments, and I think that we might be able to solve that, and we'll get back to you as soon as possible.

Senator CONRAD. I would appreciate that, and I'll have my staff share with you the names of the people involved. It's one of those things that comes up, hopefully we can get it resolved, and I very much appreciate your attention.

I also, again, appreciate very much the testimony you've provided with us here today. It's certainly useful to the committee as we continue deliberations on this matter.

Mr. RAGSDALE. Thank you, Mr. Chairman.

Senator CONRAD. Next, we are going to hear from a panel which will include, Mr. Edward Danks, President of the National Indian Contractors; Jefferson Begay, the President of Amerind Construction—I hope I'm not mispronouncing your name—and Mr. Richard Coando, Chairman of the Board of the Council on Tribal Employment Rights Organization from Wyoming.

Welcome. Now, first thing, let's see if I have pronounced correctly your names. Mr. Begay, is that the correct——

Mr. BEGAY. That's correct, Begay.

Senator CONRAD. And Mr. Coando, is that correct?

Mr. COANDO. It's Coando.

Senator CONRAD. We'll open with Mr. Danks, the President of the National Indian Contractors Association. Welcome, it's good to see you here.

Mr. DANKS. Thank you, Senator Conrad. It's good to be here.

STATEMENT OF EDWARD DANKS, PRESIDENT, NATIONAL INDIAN CONTRACTORS ASSOCIATION, MANDAN, ND

Mr. DANKS. First of all, Senator, I'd like to have total testimony that we've presented formerly introduced into the record, and if I

could, I will summarize my testimony, then exchange some thoughts and questions that the committee might choose to ask.

Senator CONRAD. We'd appreciate that very much.

Mr. DANKS. Senator, thank you very much for allowing us to testify on this very important piece of legislation. The National Indian Contractors Association over the past several years has had an opportunity to comment on various changes that have been proposed to the Buy Indian Act.

Generally, as we view this legislation we are in support of it. A particularly strong point of the legislation that we see is a resolution, or an attempt to resolve, an ongoing concern of 100 percent owned as compared to 51 percent owned firms. We have always testified, and always been in strong support of 100 percent owned firms for construction. Over the years there's been concern that, as Mr. Ragsdale pointed out earlier, by not allowing some form of joint activity, you in a sense hamper the overall economic development. And this is particularly true when you talk about large manufacturing operations, such as Devils Lake Sioux Tribe Manufacturing, Turtle Mountain, and one thing and another. So we think in that sense this particular bill strikes a reasonable harmony as far as allowing something less than 100 percent ownership on the part of Indians or tribal organizations when it comes to a variety of business undertaking. Although we do still support the 100 percent ownership for construction activities.

Another particular portion of this proposed legislation that we think is a dynamic part of it is the setting up of the advisory board. Although we tend to think that it could stand a little more horsepower, in that it's only advisory in nature, and we think that perhaps it ought to have a clear mandate so far as what it can and cannot do. But at least it's a great improvement, and we think it's good.

The one thing that we will take a little time though, is that the bill itself does not specifically address the issue of bonding. We have had years of testimony, repeatedly, and repeatedly, that the primary contributing factor to Indian front organizations, or some sort of sham operation, is the inability for Indian firms, who are primarily first generation business people, the inability to get adequate financing and adequate bonding. And we feel that until a specific effort is directed to addressing bonding needs of Indian contractors, Indian businesses, we are always going to be on the fine edge, the fine line of a problem as it's perceived to be a front or a sham deal, or whatever that may be.

We offer some support in our testimony that makes sense, dollars and cents. The average, typical Indian contractor has a very difficult time with corporate sureties and has had to resort to individual surety-type organizations to get their construction bonding. This is expensive. It costs three to four—I think the average—Jefferson may support that—but the average costs ranges probably from 3, 4, up to 5, sometimes 6, 7 percent of the gross volume of the contract, the cost for the individual bond. Or in the non—I want to use this term loosely—in the non-Indian construction the average cost of a bond is about 1.2 to 1.4 percent of the gross volume of the contract.

Now, for example, if I can refer to my testimony, consider this: The 1989 construction budget of the Bureau of Indian Affairs is approximately $220 million. And it's projected in 1990 to be approximately $221 million. In that two years time, that equals $442 million. Bond costs on the average that Native American contractors are paying today, the bond premium rate on that would be $17,600,000, as compared to the non-Indian contractor bonding the same amount of construction work at an average cost of 1.2 percent, which would give us a figure of about $5.3 million. Now the difference in cost is $12.3 million in a two-year period of time.

Senator CONRAD. Can I just interrupt you right there, and ask what is the reason for the differential? Is there a difference in loss experience that would justify that differential, or is this a differential that exists for reasons that have no solid foundation?

Mr. DANKS. Statutorily, corporate surety companies are regulated in the rate that they can charge for a bond premium. That's based on their net worth, their assets, et cetera. They have a multiplier effect as to what they can charge. So, that's a limiting factor as far as corporate surety groups are concerned. Individual surety groups are more able to—that's what the market bears. I mean, that's just where they're at.

Now take that $12 million figure that it's going to cost—I use that sort of loosely—but let's take that $12 million figure, surely for a fraction of that cost the BIA today has enabling legislation through the Indian Finance Act that gives it some authority to develop alternative forms of bonding for construction needs in Indian country. Surely for a fraction of the $12 million cost, some effort could be put into studying this issue, and coming up, we suggest, a direct bond program that closely links, or is a part and parcel of the Buy Indian Act, that's only available to legitimate, pre-qualified Indian contractors for use in Buy Indian construction activity, as compared to taking that particular bond program and competing on a State of North Dakota or Wyoming job against a competitor in that regard. But we think that a direct bond program needs—should be developed. And we think that an effort in that regard can save the Government a tremendous amount of money. We think it makes good sense.

Now, it's going to take some work, and it's going to take some effort, but we're convinced it can be done. We're talking about enough money where it should make a difference.

Senator CONRAD. All right.

Mr. DANKS. Other than that, Senator, I have some other thoughts that perhaps need to be discussed some, but I'll leave that to any questions or something like that that the committee may have. Thank you for this opportunity.

Prepared statement of Mr. Danks appears in appendix.]

Senator CONRAD. Thank you very much for taking the trouble and the time to be here, and participating. It's very helpful to us as we consider this legislation.

Mr. DANKS. Thank you.

Senator CONRAD. Next, we'll hear from Mr. Jefferson Begay, the President of Amerind Construction of Tempe, Arizona.

Welcome. It's good to have you here. And if you'd go ahead and summarize your testimony, we'll make your complete testimony a part of the record.

STATEMENT OF JEFFERSON BEGAY, PRESIDENT, AMERIND CONSTRUCTION, INC., TEMPE, AZ

Mr. BEGAY. Thank you very much, Senator.

I submitted my statement yesterday, and I have a few changes that need to be made, which I'll just make reference to in my comments.

Senator CONRAD. That's no problem.

Mr. BEGAY. But generally, the statemetn remains as I put it down. I'm a Navajo Indian from a small community north of Winslow, Teesto, Arizona. And I'm a graduate of Arizona State University in the Construction Engineering program. I grew up in the construction industry in the Phoenix Metropolitan area, workign for large to medium-sized construction companies, and that's where I have my background and experience.

I got into business in 1985 through an unusual situation where a bank, a savings and loan company was in trouble with an Indian front operation that was dipping into the bag more than they should. The bank brought in construction managers, and I was asked to finish the project for them. Out of that set of circumstances I asked the company to provide letters of credit for bonding, and also financing. That's how I got into business. I've been in business since 1985 building houses, roads, and just about anything that can be built on Indian reservations. I also build—in the Metropolitan Phoenix area I've built for this particular bank and other financial institutions on a lot of repossessed property.

So that's basically my form of business, and this piece of legislation is very important to me, because a good percentage of my work is Buy Indian. I bid on BIA road projects. I also bid on HUD Indian set-asides.

I think the critical issue, as Mr. Danks mentioned prior to me, is that bonding is the key issue. Without bonding Indians are tempted, and it's too easy for them, to look for joint venture partners that can provide the financing and the bonding to participate in the Buy Indian program. Therefore, I'm also a strong advocate for the 100 percent ownership factor. If you allow a 51 percent ownership criteria, then it's inevitable, you're going to get joint ventures and the Indian is not going to maintain control, because as one of my employees says, the golden rule applies, "he who has the gold rules."

So that's what would happen. The contractor would be controlled, and which jobs to bid, and how much the percentage of profit he would make. Therefore, I strongly advocate the 100 percent ownership clause.

Bonding is the key issue. How do we provide bonding to Indians, Indian contractors? Number one, you have to verify that this guy is not going to be a risk to you, the Federal Government. If you're going to guarantee his work with money set aside by the Federal Government, how are you going to qualify this Indian so that he's not out there jeopardizing Federal dollars? You've got to make sure

that he's got the experience, that he's got the kind of company put together so that he can complete a contract. And then, of course, the mechanism as to how to bring the bond to him. Would it be through a pool of funds set in a bank somewhere? Would it be the provision of letters of credit? There are a lot of issues that need to be answered in regard to how to deliver this.

But I firmly advocate, also, that the guaranteed bond program be implemented. Without the guaranteed bond program you can't have 100 percent ownership, because Indians generally, like myself, did not have the finances, and did not have the bonding resources to bid on the jobs that are out today in the Buy Indian market area. So I think the two go hand in hand. If you go 100 percent then you must have the guaranteed bond program. And without that then you've got to drop back to the 51 percent. And with the 51 percent all you're doing is inviting what we just went through before in January, February during the hearings and what has occurred in the past.

Today with the self-certification process. The Bureau stepped back to self-certification. They declined to certify Indian contractors any more. And I understand that this legislation and the publication of the regulations came out in October. I wasn't aware of it until there was a low bidder on a job that we bid in the Phoenix area. We were $4.71 apart on a $900,000 job. And this company had——

Senator CONRAD. What was that, how much apart?

Mr. BEGAY. It was $4.71.

Senator CONRAD. And how big a job?

Mr. BEGAY. It was about $900,000, a little less than a million.

And this company had never been around before. It was one of the companies that had come before the Senate hearings, and they changed their name and became a new entity. And I went to the Bureau and asked them if this company was certified, and they said, yes they are. They self-certified. And I said, self-certified, what does that mean? Well, didn't you know the regulations came out in October. Why aren't you aren't aware of it? Well, I'm busy building buildings. And that was a surprise to me. So, what I'm saying is that self- certification doesn't work. Anyone that wants to be an Indian can be an Indian contractor. And the burden of verifying whether they're Indian or not lies with the contractor, us.

And we have to, as I just heard Mr. Ragsdale say, is that we do have an opportunity to contest the Indianness of these companies. And I never did on this particular company, but if I'd have known I would have definitely written a letter contesting that situation. I'm aware of one other company in the Albuquerque area where I was bidding, that is in a similar situation. So self-certification does not work, in my opinion. Therefore, the Indian Advisory Panel that you are recommending in your legislation is an excellent idea.

However, one good word for the BIA, Mr. Ragsdale did have one good point, and it was that your committee members may be too high level to participate in this detailed work. Therefore, I recommend that you implement or include a panel of businessmen that would advise the advisory board on matters such as this. Get several of us Indian contractors in there that are aware of the details of bonding, to assist you in bonding and assist you in certifying these

Indian contractors. Indian contractors then cannot bid Government work until they have been certified by your committee.

[Prepared statement of Mr. Begay appears in appendix.]

Senator CONRAD. Let me, if I might, ask you—at some point you hear from the Federal Government and it all becomes way too complicated. Do you know what I mean? The Federal Government gets involved, and the next thing you know you've got a stack of regulations, and it's so bureaucratic nobody can figure it out. It's just like you said, you know, if somebody says to you didn't you know about self-certification, well that regulation was promulgated back in October of whatever it was.

I don't imagine that you go home every night with the Federal Register and sit up, you and your wife, reviewing the regulations. [Laughter.]

Maybe I'm wrong.

Mr. BEGAY. No; you're not.

Senator CONRAD. I know that we do that at home a lot. [Laughter.]

Well, it's kind of absurd.

Mr. BEGAY. That's what it would take though.

Senator CONRAD. Yes; that's really what it would take. I mean, I think what we want to do is we want to accomplish something here that serves the purpose, but we want to do it as simply as possible. I mean, clearly, self-certification is an invitation to cheat, right?

Mr. BEGAY. That's correct.

Senator CONRAD. We all know that. So that's a dead letter. So, how do we—what do we put in place that takes care of that problem? I think you've made a very insightful critique of what's proposed—that perhaps the kind of entity that we're talking about putting together is too high level. I mean these people maybe aren't the ones to actually do the work. If that's the case maybe we ought to go to something else. Maybe we ought to have something that would be a council of the business people who are involved directly in this area, and they make a recommendation.

Mr. BEGAY. I think it needs the clout that you have, incorporated into the panel. It does need that kind of clout, but it also needs "hands-on" advisors and advisory input.

Senator CONRAD. So what you're suggesting is that maybe the best way to deal with this is you have a working group that makes a recommendation, and then the advisory panel would pass on it?

Mr. BEGAY. That's correct.

Senator CONRAD. All right.

Let me go back to a point that you made, and, Ed, if you want to jump in on this you're welcome, as well. I think this 100 percent or 51 percent is really a critical issue. And I think we really need to think hard about this and get the best input we can from you. The 100 percent is what we're hearing from Indian contractors. They're saying look, if you go to a lesser amount, you go to the 51 percent standard, then you've got the automatic invitation for fronting. That's what I hear Indian contractors say. On the other hand if we're at 100 percent you've got BIA saying, well, the problem with that is then you can't joint venture. And there are situations I think we probably know about—I do, in our State and Ed, I think it's fair to say that you would—where you need a joint venture to

get the thing rolling. At some point you could move to 100 percent, but at least to get the operation up and going, if it has some significant size to it, you really need a joint venture partner. Any ideas on how we bridge this gap?

Mr. DANKS. If I may, Senator.

Senator CONRAD. Yes, Ed.

Mr. DANKS. For a good number of years, we in the National Indian Contractors Association have been saying there are occasions where a joint venture is necessary. And there should be a legitimate mechanism by which a joint venture can be organized, and can be structured for a specific task. Rather than to have a joint venture be the standard way of business that's done, there are times when specific jobs require a specific instance where they're just too big. And then at those particular times joint ventures make all the sense in the world. They should be up front, people should understand who's involved, who are the key players, and let's get on with doing business.

Our position has always been that the Indian contractor should always be 100 percent Indian owned for a variety of different reasons; to build the equity, to develop the expertise, to subcontract items that sometimes they cannot perform. But there are instances where a legitimate joint venture makes all the sense in the world. And there should be a mechanism to accommodate that.

Second, I think it makes sense, and we have participated in a number of meetings with Alan Parker and his staff, with different people. There is a concern when we talk about Indian businesses being 100 percent Indian owned. For example, I go back to the earlier thought of the Devils Lake Sioux manufacturing, La Pointe, those sort of things like that, there is room in this business world for a legitimately organized 51 percent organization. There is room for that.

The way we have proposed in the National Indian Contractors Association is do a better job in pre-qualifying. I think where the real problem gets into, is we've got somebody that makes chamber pots one day, and the next day they're organized and they're building highway construction projects under some guise or some operation. And there's no pre-qualification done. In North Dakota, we pre-qualify as to highway contractor, as a plumber, as a roof builder, or whatever, and we are restricted. We are not even sent a set of plans, to build a road project, if we're not pre-qualified as a road builder.

Senator CONRAD. Who does the pre-qualification?

Mr. DANKS. The State Highway Department of North Dakota. They have a committee and they sign it, and they review your financial statements, your work record, your history, et cetera, and they say, okay, you're pre-qualified to be a road builder, and we're not going to send you asbestos removal plans, because you're not pre-qualified to do that.

Now, should the situation happen where there are no pre-qualified Indian contractors to remove that asbestos, it doesn't make sense, from our point of view, to hold up the economic development activity, to hold up the service that needs to be done in Indian country, because there are no Indian contractors, and encourage some sort of a front organization to put it together. However,

should a legitimate Indian asbestos removal company get organized and get pre-qualified. That would make sense. We've always been of the opinion that pre-qualification leads to the scrutiny and gives the program managers in Indian Health Service, the house people, the BIA road people a true picture of who's out there in Indian country and who can do what. We think a pre-qualification package is up to this advisory committee, could go a long ways to help us assess just what do we have for people out there to do these things.

Senator CONRAD. So what you would do, just to summarize and make sure I've heard you correctly, is you would not require the 100 percent, but you would attempt to deal with the problem coming at it the other way?

Mr. DANKS. We're a strong supporter of 100 percent. And we will require 100 percent. As far as road construction activity—Senator, it's important to understand that the only time that Bureau of Indian Affairs is using the Buy Indian Act in construction is only for road construction. BIA is not using them for housing and those sorts of things.

Senator CONRAD. Well, I understand you're saying that you strong support 100 percent.

Mr. DANKS. Right.

Senator CONRAD. But on the other hand you're saying there are times when it's appropriate to have 51 percent. How do we harmonize this?

Mr. BEGAY. Senator, maybe I can add to that. I think that can be remedied by the bond limit. If you require 100 percent ownership, and a guaranteed bond program is put in place with an unlimited or a bond limit that would satisfy the kind of projects that he's talking about. Take for instance, some school jobs that are coming out in Arizona, $22 million, $14 million, $10 million. My company is not able to bond something like that unless it's a joint venture. However, if the guaranteed bond program, which is a part of this legislation, which hopefully will be part of this legislation, does not limit us to $10 million, then I would be able to bid that job as 100 percent Indian with a guaranteed bond, and will not need a joint venture. That's why I kept saying that 100 percent with a guaranteed bond.

Senator CONRAD. No, I understood your position that you've got to have—if you've got the 100 percent, then you've got to have the guaranteed program——

Mr. BEGAY. Right.

Senator CONRAD [continuing]. Or it won't work.

Mr. BEGAY. But you don't want to also establish a freebie program where you have an unlimited bond out there and you're qualifying Indians that may not be able to complete a contract.

Senator CONRAD. What do we do about joint ventures that already exist, that are legitimate, straightforward joint ventures that aren't phony, and I've seen them. What do we do about those folks? Are they grandfathered, or how do we operate?

Mr. BEGAY. I would say that you'd probably have to send them through the new grind machine. Grind them through the new machine so that everyone starts off from the same line.

Senator CONRAD. Ed, any further observation on that point?

Mr. DANKS. In reference to what Jefferson just said, I think that, again we're a strong supporter of 100 percent operations, but I do think that there's room, at times, and this is a program management. There should be something in the bill, and I understand that as I read the bill there is some enabling legislation that allows a joint venture. I don't think a joint venture should be the standard operation, but I think there are occasions when joint ventures are legitimate operations. It's the only way to go at times.

Senator CONRAD. All right.

Let's go next to Mr. Coando, who has been waiting patiently. Richard Coando is Chairman of the Board of the Council on Tribal Employment Rights Organization from Wyoming. Welcome. It's good to have you here, and if you'd proceed with your testimony, then we'll go to further questions.

STATEMENT OF RICHARD COANDO, CHAIRMAN OF THE BOARD, COUNCIL ON TRIBAL EMPLOYMENT RIGHTS ORGANIZATION, FORT WASHAKIE, WY, ACCOMPANIED BY CONRAD EDWARDS, EXECUTIVE DIRECTOR, COUNCIL ON TRIBAL EMPLOYMENT RIGHTS ORGANIZATION, FORT WASHAKIE, WY; DAN PRESS, GENERAL COUNSEL, HERON, BURCHETTE, RUCKERT, AND ROTHWELL, WASHINGTON, DC

Mr. COANDO. Thank you.

Mr. Chairman, members of the committee, my name is Richard Coando. I am a Shoshone from the Wind River Indian Reservation. I am also the TERO Director, and currently the Council for Tribal Employment Rights Chairman. Today with me I have also to my right, Mr. Conrad Edwards, and Mr. Dan Press, the CTER Executive Director, and legal counsel.

I have a few critical needs, I believe we need to look at. I am here today to emphasize several crucial needs which support your continued forward movement, and proposed amendments to the Buy Indian Act of 1910. My written testimony reflects the CTER and the 119 TEROs it represents, are committed to providing access to economic opportunities for Indians and Native American people. and I would like to bring out the fact that over the past 12 years we have employed a sovereignty based tribally developed strategy for economic self-reliance and which effectively: First, protects the rights of Indians to preferential employment in contracting; second, develops existing opportunities on and near reservation communities; and third, creates new opportunities for Indians through the creation of new economic ventures in the local and global markets.

I would like to defer to the written testimony for the detailed discussion of the effectiveness and impact of some of the work that has been done by the Tribal Employment Rights Offices. I would like to now discuss some critical areas of concern which we hope S. 321 will address. The need to clarify more fully the sovereign authority and capabilities of Indian tribes and the role of public agencies in protecting and developing, and creating Indian economic opportunity through effective implementation of the Buy Indian Act.

I would like to share with the committee and illustrate, and highlight a few problems that we have had, and I'm speaking on

behalf of my experience as the Tribal Employment Rights Office Director, on a BIA construction project. And the contract documents language specifically spells out that the prime contractor must submit an Indian Subcontracting Preference plan, or the bid will be considered non-responsive. At that time, what had happened is the end result from assuming that the BIA Contracting Officer would uphold the provision that was in the specifications, the result ended that the prime contractor failed to provide preference to local Indian subcontractors, and number two, Indian subcontractors alleged that there may have been bid shopping, and number three, there was a complete breakdown of enforcement and compliance on behalf of the contracting officer not following proper procedures.

What we had to do, or myself as a TERO Director, I mentioned this at the pre-bid conference, which I felt very strongly for the—or advocated for the local Indian subcontractors that there was a complete breakdown here of responsibility on behalf of the contracting officer, where that we had legitimate Indian owned businesses that were not contacted, or when they were contacted it was after the fact of the bid, and which at one point they were notified that they were the low bidder at the time of bid opening, or right after bid opening. And it caused some concern there where the local Indian contractors were unable to basically get into the contracting scheme of things.

And at that point, during that bid opening, I brought it out to the attention of not only the contracting officer, but then Indian owned business, and they did take a look at it later on and we were able to successfully negotiate a couple of Indian subcontracts, or contracts that were made available to some of our local Indian people. The point I'm trying to make is that the tribes need to clearly establish, or be in a clearly established leadership role in the implementation of S. 321. And it's been brought out, the two gentlemen here have spoken briefly on the certification process, and most Indian tribes—and I'm speaking for the 119 Indian tribes—have individual certification processes, whereby the tribes have a certification process already in place that where we have been—I'll speak on behalf of the Shoshone and Arapahoe tribes, that we have moved the Indian ownership up to 85 percent because of the fronts.

We feel very strongly that there needs to be that clear distinction between the certification of a tribal entity, and then when the BIA or any other Federal agency is doing the certification. And I believe there is where we need that clear understanding or the role of an Indian tribe or entity when we get involved with that situation.

I would like to give an example of an enforcement or breakdown—or I just gave that example of the enforcement breakdown, and I would like to provide an example of when an agency, such as the BIA and a TERO works together. After one of our situations with the Bureau of Indian Affairs, we sat down, both parties—and I'm talking about the Contracting Officer and myself—and we worked out the problems and the areas of concern that we had that the Tribal Employment Rights Office, that we certify local Indian contractors. The tribe certified these local Indian contractors in

which we may have problems through the BIA certification. We worked these problems out and whereby the contracting officer submitted our list of local Indian contractors to—and all of our local Indian subcontractors—sent a list to every one of the plan holders, and also notified each plan holder of the tribal—notified them and advised them that the tribe or Shoshone and Arapahoe Tribes have their own regulations and laws, and also have these contractors that they have recognized as being Indian contractors. That project went smoothly. We had Indian contractors that were put on the project. It was bid legitimately, and everything was up front.

Again, the tribes—that particular construction project was within that jurisdictional boundary of that reservation, and they supported those—they, I'm speaking on behalf of the tribe—supported those local contractors as being legitimate Indian owned firms. With that experience I think it was really fruitful for both parties, not only the BIA, but the tribes. The BIA did recognize that the tribes did have legitimate Indian contractors and the project went smoothly.

Mr. Chairman, I'd like to conclude my testimony with an example of the results that can be produced when Indian tribes and public agencies join together in a partnership for a common purpose. My testimony contains some background on Public Law 94-148, so I won't explain that. But Public Law 94-148 is a law that has been very useful in acquiring or accessing employment opportunities through the Forest Service Program. On the Wind River Indian Reservation we're surrounded by a number of Forest Services. And until a couple of years ago we were unfamiliar what Public Law 94-148, which is a human resource agreement, that authorizes the Secretary of Agriculture to enter into agreements with Indian tribes to provide employment opportunities.

With this agreement we've entered into—with the Forest Service Programs we've been able to place a number of Indian youth and Indian people in these various job opportunities that are with the Forest Service. There are many other successful tribes out there that have done the same thing in initiating this same public law, like the Blackfeet Tribe in Browning, Montana have done the same thing.

What we are saying, or asking, is that the committee recognize that there are agencies with those regulations as Public Law 94-148 that would give tribes the opportunity to access the National Parks, the Bureau of Land Management, and a number of other agencies that are under the Interior Department. With that type of cooperation under Public Law 94-148, it would give the Secretary of Interior the authority to sign human resource agreements with Indian tribes so that we would better be able to access some of those employment opportunities that we have not been able to access presently, which have worked out very well with the Forest Service throughout the country.

With that, Mr. Chairman, I thank you and the committee for your time.

[Prepared statement of Mr. Coando appears in appendix.]

Senator CONRAD. Thank you very much. We appreciate your testimony.

Mr. Danks had indicated in his testimony that there have been some problems with TERO's shielding themselves with sovereign immunity when their decisions may have been mistaken. I'd like to get your reaction to that. You've been involved in TERO activity. Have you seen that problem, heard it from others? Is that something that we need to be taking into account?

Mr. COANDO. That might be—and again, I haven't heard that, but it may be an isolated case. And in most of the situations that I'm familiar with claiming sovereign immunity and I guess which—maybe I'm a little bit confused on the question. In which area are they, Mr. Danks, claiming—

Senator CONRAD. Ed, maybe you'd like to explain what you're referring to.

Mr. DANKS. Yes, Senator.

I mention that in my testimony and relate to how corporate surety groups view bonding contractors in Indian country, in the sense that they have a—the role of the TERO group, they don't truly understand. And they feel that by not truly understanding that role and the impact that they could or could not have on a construction contract. The question was put legally, if a TERO director of the TERO program can affect this contract. And let's say that that decision was misguided and there was a legitimate issue on behalf of the bonding company, and I had to pick up the pieces for this Indian contractor that goes broke, and I can identify that there was a valid mistake made on the part of the TERO decision, what's to stop them from shielding themselves in their sovereign immunity, as they are part of the tribe. That's the way the issue was put to us. And that is an identifiable concern that corporate surety groups have.

Mr. COANDO. Mr. Conrad, I'd like to have Mr. Press maybe address this issue.

Senator CONRAD. That would be fine. Welcome, Dan.

Mr. PRESS. Thank you, Senator.

The TERO program is a tribally imposed program, and it's not subject to Federal regulation and we're pleased that it's not, because it's allowed the tribes to exercise a lot of ingenuity and creativity.

The Council for Tribal Employment Rights enacts model ordinances, and we encourage all of the individual TEROs to adopt them. And each one of them provides the for tribal court review of any decision by the TERO. We're very, very conscious of due process requirements. The TERO itself provides a quasi administrative hearing and then appeal from there to the tribal court.

We can't force any tribe to adopt that procedure, but I'm not aware of any tribe that has a TERO ordinance that doesn't provide for appeal to tribal court. So my impression is the surety would have the same due process rights and ability to get beyond the TERO sovereign immunity as it would anywhere else in the country dealing with any other State and local government agency. If an exception exists, we'd be glad to work with it. Ed and I have talked about the fact that there are periodically TEROs that we're not proud of, the same way there are contractors we're not proud of. And the National Indian Contractors Association and the Coun-

cil for Tribal Employment Rights are going to try and work together to be able to correct those problems.

Senator CONRAD. All right.

Let me ask this. I want to give everybody a last chance here, because I'm about to turn the hearing over to Senator Cochran, and we'll be going on to the third panel. We have two witnesses remaining in that third panel.

But I'd like to give any of you, if you've had a final thought here, a chance to express it. Ed or Jefferson, or Richard?

Mr. BEGAY. Senator, I'd like to make a point on the TERO issue, since this is on the table right now.

Senator CONRAD. Yes.

Mr. BEGAY. I believe that the TERO regulations, the TERO organizations came into existence during the Buy Indian—or during the era when non-Indian contractors were doing a lot of construction work on Indian reservations. They were not utilizing Indian labor forces and Indian subcontractors. These regulations were there to regulate the non-Indian contractor.

We, as Indian contractors 100 percent Indian owned, sympathize, empathize with the situation out on Indian reservations. We make it our company policy to hire local subcontractors if they're capable, and also laborers. And I think TERO has grown on some Indian reservations to be overregulating. And they do add a cost to the construction. For instance, on my particular reservation, I think, and I've heard this from other Indian contractors, that the cost of doing business on that particular reservation is anywhere from 5 to 10 percent more than it should cost because you have to deal with TERO, because you have to deal with the labor relations office, the preference office, and a whole number of other offices. And they don't like dealing with that. And then again you have the surety question here. We can't get bonded on those reservations because it's overregulated. The sureties are afraid to risk their bonds on those reservations.

That's the only additional comment I'd like to make.

Senator CONRAD. All right.

Ed?

Mr. DANKS. Senator, down in our end—and Conrad Edwards here with counsel have also discussed this at length.

Senator CONRAD. Very good name. [Laughter.]

Mr. DANKS. Well, we have, as Dan mentioned, they have some problems and the National Indian Contractors certainly don't have sparkling white linen either. We have some problems with our organization as far as legitimacy of people and people taking advantage of things.

By and large the TERO has done a very good job. And there isn't a particular problem from the National Indian Contractors as far as the TERO organization is concerned. But there is a problem, as Dan has said, they haven't been able to tell all tribes, you do it this way, we've developed the model, and one thing and another like that. And some surety groups take exception. They say, hey, who do we appeal to if there's a problem. And we think that there ought to be a little more definitive role as to where the line stops and starts. At least that's what's been suggested to me on the part

of some corporate surety counsels. And also some individual surety counsels brought the same issue.

Senator CONRAD. Okay.

We appreciate the input. I want to thank this panel very much. You gave excellent testimony that's helped the committee and we appreciate your taking the time to participate.

Mr. BEGAY. Thank you, Senator.

Mr. COANDO. Thank you, Senator.

Mr. DANKS. Thank you.

Senator CONRAD. At this point I'm going to turn over chairing the hearing to my colleague, Senator Thad Cochran, from Mississippi. And we have two witnesses.

Senator COCHRAN. Thanks very much, Mr. Chairman. I'm very glad to be able to participate in this hearing today, and I'm glad to invite to the witness table, at this time, William Richardson, who is Director of the Office of Economic Development, Mississippi Band of Choctaw Indians, from Philadelphia, Mississippi; and Mr. George Bennett, who is the American Indian Business Development Consortium, Inc. representative from Suttons Bay, Michigan.

We appreciate you being here with us today, and helping us with your suggestions and observations about the legislation that we are reviewing. I know that all of the witnesses who were testifying today will be able to give us some insight into how we can design legislation to help promote self efficiency on Indian reservations, and also to enlarge the opportunities for Native Americans who own businesses participate fully in the economic mainstream of the United States.

So without going into any of the details of the legislation, let me thank you for being here and encourage you to proceed as you wish. Let's start with William Richardson.

STATEMENT OF WILLIAM RICHARDSON, DIRECTOR, OFFICE OF ECONOMIC DEVELOPMENT, MISSISSIPPI BAND OF CHOCTAW INDIANS, PHILADELPHIA, MS

Mr. RICHARDSON. Thank you, Senator.

I'm here today representing Chief Phillip Martin of the Mississippi Band of Choctaw Indians. As a background note, the Choctaw Tribe is located on 21,000 acres in eight, mostly rural, communities throughout east central Mississippi. They have 5,000 enrolled members.

Chief Martin and other tribal leaders in the last 10 years have developed 375,000 square feet of manufacturing facilities and 78,500 square feet of other commercial space. We have six manufacturing plants, a shopping center, and a 120-bed nursing home. All of these facilities together generate $25 million in income and $55 million in sales.

As the others have said, I assume my testimony as written will be entered into the record, so I'm going to skip past what I said are some of the benefits of this bill to the socio-economic environment on reservations, and simply say that I think this developmental strategy of putting Federal dollars that are already programmed to be spent on Indian reservations into the hands of the Indians to

help spend and gain many benefits back will reduce a lot of the long-term problems on reservations.

My testimony will center more on problems of tribally owned enterprises and what we hope to see that this bill will address for them. We do not have a lot of individually owned enterprises on the Choctaw Reservation. And the main reason we don't is there's no capital base or no market. I feel in cities, such as this, and with other Congressional actions coming forward there will be a better market for businesses. But given the remoteness of our location, it just simply doesn't exist.

One of the main problems that we see that this bill does not address is the shortage of capital in the reservation economies. This first surfaces as the Contract Compliance Office that is required by this bill. We do not see this as a traditional tribal governmental function. If the bill has this requirement, we would hope that it would have some provision for funding this office, or possibly as was earlier suggested, making it another function of the Bureau, or some other agency.

The second is a little bit more complex and has also been discussed here today. It is that of the bond requirements. We would submit that possibly the BIA Loan Guarantee Program could be used to assist in the bond requirements, but given their past track record and understanding of business methods, I'm not sure. With their enthusiasm, I'm not sure they'll play along with it. I'm aware that there was some $500 million allocated by Congress for them to put into the market place, and I think there's something like $200 million, or less than $200 million, currently in guarantees. With that type of attack on the problem, I don't know that they'd ever take the complex thing of guaranteeing a bond or not. Hopefully, this committee can encourage them to do that.

We, at the Choctaw have, as all tribes, have occasion to look at opportunities that are nothing but fronts for Indian operations. We avoided any of these traps through the check and balances of the tribal government. We feel that day-to-day management of the tribal enterprises by non-Indians doesn't really affect the profits and the benefit that these enterprises provide to the tribe. I agree that the intent of this language is to keep any business, Indian owned, from being a front. But the question really should be is who benefits most from the profit. Whether it's managed by an Indian or non-Indian it really gets to be irrelevant as long as there are proper Indian hiring practices and such like. Because if you don't have good management you're not going to have a business and then everybody is going to have lost the job that they started off with.

We at the reservation have two joint venture partnerships where we are 51 percent, or greater, owners. These are governed by a Board of Directors. The Board of Directors are a majority Indian board members. They set the policy. They've hired highly technical management people to run these ventures. And it's working well. They're 3 and 4 years old. They're generating—one's about $12, the other is $13 to $14 million in sales. All told, probably 300, 400 jobs. That's working in our economy. It's creating jobs. It's making the profit necessary to stay. There are mid-level managers that have

been brought in that are Indians. In time they will be experienced enough to run these operations.

The labor pool that we have to draw from, as I've seen on other Indian reservations, is pretty thin, of technically trained people. Admittedly there are some technically trained Indian folks, but there are not that many to go around. The Choctaw Tribe doesn't have many. So, again, I stress the key to a tribally owned enterprise should be who is the profit going toward, and how is that profit benefiting the tribe.

The same would apply in limiting tribally owned enterprises to only two joint venture agreements. I'm not quite certain, having reread the bill as it's proposed several times, if that would limit tribal government owned enterprises. I know we've got into this trap with the SBA and their 8–A program, where a tribal government enterprise was the only 8–A, and there were no more, regardless of which avenue you were trying to go in. We disagree and feel that the tribal government, in our case and in a lot of other underdeveloped tribes, is the center of the brainpower in most cases, and certainly has more expertise in putting together the financial venture package needed. As long as the profits run back to the tribe to be used to offset tribal programs and Federally funded programs. That's the real key.

I, in my written testimony, make five specific requests that this committee should look into and I'll just touch those very quickly. We would hope that the language of this bill limits any unnecessary Federal agency procurement and complicated methods. Let's streamline it and make it easy to understand, not a 16-page summary of what you want for one pencil. You know, that's overcomplicating it.

Second, we would ask that some funding be provided for the compliance office or some other source other than leaving that up to the tribe.

Third, we would ask that a waiver or a reduction on the performance bond for any project be considered for tribally owned businesses.

The fourth is the day-to-day management, we feel would just be a disaster if it is limited only to Indians per se. As long as the Board of Directors is majority Indian and sets policy, I think the execution of that policy is really unimportant.

And the last thing would be to allow tribal enterprises to have more than two joint ventures, because, as I mentioned, that's the source on our reservation and other reservations for the expertise to putting packages together.

I thank you all for this opportunity to address the committee. And any questions you have, I'll be glad to answer.

[Prepared statement of Mr. Richardson appears in appendix.]

Senator COCHRAN. Mr. Richardson, thank you very much for your excellent statement.

I think we'll go on now and hear from Mr. Bennett, and then at the conclusion of his presentation we'll have an opportunity for discussion of your testimony.

Mr. Bennett, welcome to the committee.

STATEMENT OF GEORGE BENNETT, EXECUTIVE DIRECTOR, AMERICAN INDIAN BUSINESS DEVELOPMENT CONSORTIUM, INC., SUTTONS BAY, MI

Mr. BENNETT. Thank you, Mr. Chairman.

Members of the committee, I'm very pleased to be here today and I bring you greetings from the State of Michigan, winners of the NCAA basketball, what-have-you. And as I said, I'm honored to be here to render testimony on S. 321. My name is George Bennett, and I'm an Ottawa Indian and the Executive Director of the American Indian Business Development Consortium, better known as AIBDC.

We're kind of the new kid on the block with regard to economic development, but we have a unique program, and we are a Michigan corporation, and I've provided my testimony to the committee for the record. But I would just like to elaborate maybe a little more in terms of not being so systematic.

We're a corporation that is involved in the dedication of our efforts to create profitable businesses, both on urban and reservation settings within our State. We operate under a unique partnership and relationship with the Federal, State, local and tribal governments. Over the past two years we've been fortunate enough to acquire appropriations from the Congress—for which we're very grateful to this committee, as well—to match with the Michigan legislature, and create economic development models within our State. We're back again, seeking no increase, but to remain at the same level.

We have a point plan that we operate under within our State to ensure economic growth, stability and long-term employment. And we have within our State, and as an example within the last year, we've created 15 new business, which created 86 new jobs within our State. We have a primary focus of working with tribes and reservations. Presently, we're working with the State of Michigan in creating the first American Indian BIDCO within the Nation.

With the new appropriations, and I'm not here to testify on that, but we hope to set up a procurement office that will impact, and we certainly are concerned about S. 321 as we venture into the business world.

Our plan is unique in that it's done in cooperation with all seven tribes within the State, urban Indian centers and the private Indian business sector, as well as the State of Michigan. As a matter of fact, we are a community growth alliance agency established under the State of Michigan.

We feel that this might be a model that maybe some of the other tribes in some of the other States might want to encounter or work with, and we'd be more than happy to help in that endeavor.

The purpose of my presence here, Senator, is to render support for S. 321, and hopefully offer some concrete recommendations.

And I'd be remiss if I didn't tell you about our population, our people. We have 61,000 people, in excess of that within our State, primarily from Ottawa, Potawatomi, and Chippewa. And our population is widely dispersed throughout the State of which about 23 percent are residing on or near the reservation. And 77 percent live off the reservation or in urban areas. Our unemployment rate

is far too excessive, as most reservations are. We have approximately 50 percent and with our efforts we hope to reduce that. It's reduced seasonally because we have a great deal of people that work in agricultural areas, as well as we have a very high tourism budget in the State, and our people are very much employed in that area.

I was hired a year ago as the Executive Director. So, I've not been on board all that long. But I am a graduate of Antioch University, and I have a degree in Community Studies, majoring in Economic Development. My career includes 17 years as a production manager for General Motors Corporation, Oldsmobile Division. In addition, I've had Indian Affairs work over the years with local, State, and in the Federal Government. For 15 years prior to this position that I'm in now, I worked with the U.S. Department of Housing and Urban Development in the Indian housing program. And so I bring to you some experience of hands on programmatic, I call action, or inaction, whatever the case may be, in terms of providing some concrete recommendations to the committee.

First, I wish to applaud the committee for taking the initiative to strengthen this law. Very much needed. For the record, like I said, we would like to make about four recommendations.

Number one, the advisory committee on Indian preference. We've heard several comments from other presenters. We would like to see other agencies involved in it. We don't mean to make it a great boondoggle, if you will. We would like to see other agencies included such as Environmental Protection for our survival. And that was submitted in the bill, as well as the Administration for Native Americans. Now, I have not contacted these agencies in any way, shape or form. But there are a lot of dollars that are being spent on environmental issues, as well as economic development issues funded by these agencies. So we make that recommendation as recommendation number one.

In our observation of the bill we would also like to talk about the 100 percent Indian owned enterprises. We know that there is a distinction between 100 percent and 51 percent Indian owned operation. Specifically, we'd like to make a recommendation. The recommendation that we have is to devise a point system formula under which Indian owned enterprises competing for contracts would be awarded an additional preference if they were 100 percent Indian owned. For an example, when a contract that is 75 percent Indian owned and certified, we would suggest that maybe a 75 point system would be created, and so on, such as if they were 51 percent, they would get 51 percent.

In addition to that, we would also like to see that formula include the amount of the contract. In some Governmental agencies there's a 10 point leeway, or there has been a 10 point leeway that we're familiar with. But we feel that in giving preference to 100 percent Indian owned firm, that it would enable the thing that you're trying to do, I believe, is to discourage fronts. And I think this would certainly do that.

The other area of concern in the bill that we see is the enforcement issue. We would urge the committee to clearly require respective Federal agencies as members of this advisory committee to create contract compliance offices. By doing so, we feel that there

could be monitoring and enforcing before, during and after the project completion. As you well know, Senator, the name of the game is profits when you're in business, and I think there needs to be an evaluation at the close-out of every project to see where the profits are really going. Often times Federal laws, in my opinion, ought to be enforced by Federal officers.

Then I looked at the bill, my own prospective, and found that the bill was what I call a lion without teeth. There were no penalties. And in our discussion with the staff we found that Senator McCain's proposals to enforce penalties for violations of this law certainly appear to be in order. We would strongly recommend that Senator McCain's comments or his amendments be adopted by the committee.

And that concludes my remarks.

[Prepared statement of Mr. Bennett appears in appendix.]

Senator COCHRAN. Thank you very much, Mr. Bennett. We appreciate having the benefit of your testimony and also the testimony from Mr. Richardson on this legislation that we are considering.

I think you may be the only witness who has testified today suggesting a point system formula for competing contracts, trying to weight those in favor of the ones that are predominately owned by Native Americans, as opposed to those that are just 51 percent, joint venture arrangements. We do have a provision in the legislation that says that as far as construction contracts are concerned that it would be 100 percent Indian owned businesses that would be eligible for preference. Trying to deal in that way with the front arrangement that we sometimes run into.

But I think that is interesting and that we ought to consider your recommendation on that. As you were suggesting it, this wouldn't apply to construction contracts, it would apply to other kinds of contracts and business opportunities, is that correct?

Mr. BENNETT. I would recommend that it be incorporated in both respects. To me business is business, and I think we would be remiss if we didn't develop a standard that would be workable in both procurement as well as contracting.

Senator COCHRAN. I'm a new member of the committee and I was interested in your suggestion also on the advisory committee, including the Environmental Protection Agency and the Administration for Native Americans, as a source for members of that advisory committee. Does the Administration for Native Americans have status as a Federal agency, like Environmental Protection Agency?

Mr. BENNETT. I do not believe they do. I believe they're under Health and Human Services. They're a division within that agency.

Senator COCHRAN. They are under Health and Human Services?

Mr. BENNETT. Yes; they are.

Senator COCHRAN. Okay.

The purpose of the advisory committee is something that I think we need to look at. What do you see as the role of these advisory committee members, and why should they include these additional agencies?

Mr. BENNETT. Well, Senator, when you're issuing, or you're involved in contracting on the reservation, as well as off the reservation, and if we're talking about Buy Indian or otherwise, we're talking about Indian preference. In these areas I think we would be

remiss if we did not include them, especially if there are dollars going out into Indian country. It would be like letting some agencies off the hook, which came to my mind a clause on page 5, down on line 19, refers to the authority of preference awarding of contracts by the Interior Department. It refers to paragraph one and it wasn't really clear in the law. And I didn't know really how to interpret it. I kind of took it like it was like giving the authority and letting agencies off the hook with regard to Indian preference. And I've been a very strong advocate of Indian preference in my career in Government, and I think it is incumbent upon the Federal agencies involved to be responsible and held accountable for carrying out that law.

Senator COCHRAN. I notice that Mr. Richardson talks about experiences in dealing with front operations. You made a point about how you were able to deal with that problem. What have some of your experiences been in terms of the tribe being approached to establish front operations, and how do you avoid getting involved in those kinds of situations?

Mr. RICHARDSON. I think every tribe has probably been approached. The Choctaw enjoys a good reputation of being a business tribe that's out on the edge and doing things. I've been involved with the Tribe for five and a half years, and more so at the beginning of my involvement, we had probably on a weekly basis people coming by with, "boy, have I got a deal for you." And I don't know if our reputation has pushed more of those people to the side, but we don't get that as often as we used to.

The way we dealt with it, or it was dealt with, was just a process of weeding through a business deal, the same way you would look at a business venture, or any prudent person would. What's in it for us, and what's in it for them. And usually when you ask the specific questions of exactly what are you bringing to the table, we know what we're bringing, they'd usually leave. Should it ever, and I don't recall any example of one that got past that point, but all of our joint ventures and all of our tribal businesses go, at some point in their process, before the tribal council for an ordinance to create that entity. Well, that throws it to the scrutiny of 16 additional people. Chief Martin uses a lot of staff and outside experts to weed through the deal. So it's a real good check and balance of staff and political process.

I think within that system I don't see how any fronts could be started as a tribal government entity. That doesn't say that an individual would have to go through that check and balance, so that's why we feel the individual businesses should be looked at more closely or through some other way.

Senator COCHRAN. I wonder whether or not the tradition of ownership of property, as far as individual versus tribal ownership is concerned, has presented any special problems in dealing with other agencies, such as the Small Business Administration, and would it present problems under this bill that should be addressed and maybe ought to be corrected as we're writing the bill?

In other words, you talk about joint venturing, you have to do it in behalf of the tribe, not a specific individual, isn't that correct?

Mr. RICHARDSON. That is correct, but all of those things lawyers can solve, or they have in our case. The pledging of trust lands, for

instance, in a bank note. You can't do it. But you can do it if you can pledge a lease hold interest. And we've found financial institutions that accept that as collateral, as long as they can—should they foreclose, they can go in and enjoy the use of the building for normal terms that their loan would have been. So it requires looking at financing packages differently, than historically you or I would normally look at one.

As to the SBA, you mentioned, we had a problem where they allow one person one 8–A designation, and they viewed tribal governments as a person. This has been changed through the leadership of the staff of the committee here. We have a construction company, it was an 8–A, so thereby we can't sell automotive speakers as an 8–A. Now, that's not in line at all. So things are working out, but I can see how that would develop, because 10 years ago you didn't have anything anyway, so nobody was sitting at this table saying we need more than one. There was very little economic development, and certainly not into things that are non-traditional Indian development, such as the Choctaws have done, and other tribes as well.

Senator COCHRAN. Mr. Bennett, what is your reaction to that situation? Do you feel that this legislation will help deal with those communal ownership arrangements and provide encouragement and incentives for preference?

Mr. BENNETT. Senator, I do think that the bill would enhance productivity out there on the reservations. Of course, we work in both areas, both arenas, within our State, but we're quite a bit different in our land holdings. We're very small communities. We looked at the other aspects of it as well, the enforcement end of it and—but I don't foresee any real problem. I've worked with the Choctaws for many years. I've seen Chata Construction grow, and I've seen many other construction companies started. As a matter of fact, when I first went to HUD, I was an advocate for—it was part of my duties to help create construction companies, legitimate companies, and make them viable. At the same time I did likewise in counter front that we didn't want to deal with.

Senator COCHRAN. There was a question about bonding. When I came to the hearing today, Senator Conrad and a witness were discussing this issue of providing bonds. Do you have any suggestions that you would like to add to the hearing record about the performance bond issue, and how it could be resolved through this legislation? I guess this pertains particularly to construction contracts.

Mr. BENNETT. Senator, I know that bonding is definitely an issue out there. However, I question whether it should be a part of this legislation, even though it is a concern. I think there are other areas of responsibility that should be taken on by say the Small Business Administration, and some other agencies. I really feel that it's a debatable issue.

I know in our State what we hope we can do, we're forming our BIDCO, as I mentioned, and part of that will be to help assure that bonding is going to be provided to our construction companies.

Senator COCHRAN. Mr. Richardson.

Mr. RICHARDSON. Our construction company is tribally owned, so that's my main perspective, again. But we do a—we're currently in the process of building a BIA school, and the construction company

has that contract. They could not be bonded for a $4.7 million school in traditional methods.

The way this was resolved is, again, it goes back to who has the money on reservations, and it's the tribal government. So the tribal government bonded, self-insured, if you will, the construction project by waiving their sovereign immunity to the point of the contract. Doing business on a reservation, being an Indian or non-Indian, or whatever, the rules of business still apply. If you enter a contract, it's got to be enforceable. I don't think that through this bill or any other bill of Congress, and I think Chief Martin would agree with me, that you can't leave the Federal Government holding the ball. If the Federal Government says let's build a school, and we're going to let this Indian Tribe, Chata Construction Company, build that school, Chata better build it, and something's got to be behind Chata to insure that the Federal outlay won't exceed what they thought it would, as though they were dealing with a major non-Indian construction company. And I think that attitude has to prevail.

As to the individual Indians, I think the BIA guarantee program possibly could work for that. Again, it will be an educational process. That to me, would be the logical place. A surety bond is nothing but a loan in the event you default. If they would guarantee that loan, or the potential of that loan going bad, they should guarantee a bond for performance, in my opinion. So that's one way.

Senator COCHRAN. Mr. Bennett?

Mr. BENNETT. Senator, in my experience, my career, one of the things that we looked at in bonding as a possibility, is we know how costly it might be and could be for the type of project that my colleague here is talking about, but it always appeared to me that maybe a solution to that type of thing would be to get into phase bonding. In other words, not bite off more than you can chew. If you had a $4.5 million project, if they could reach a maximum, say $2 million, or half that amount, and then roll that bond over once they reach that point in their construction, so that we could enable our companies to take advantage of not only having that bonding, make sure that the project is in fact being built, but also that it would be less costly in the long run.

Senator COCHRAN. Should there be distinctions made between Indian owned and tribally owned enterprises concerning exemptions of bonding and limitations with two ventures.

Mr. RICHARDSON. I think the two ventures, there certainly should be. And that maybe goes back to the old 8-A mentality, but an individual probably should have a couple of opportunities. But I know few individuals that are capable of performing well on multi-task deals that are not related. You just don't have that many people that can do two different things at one time, well, whereas through a tribal government you might have separate Board of Directors overseeing the operations of multi-operationals. So the tribal government, we should not be limited to the two, and should have more rein to pick and choose the areas they could do.

As to the bonding distinctions, I may be stepping a little beyond what Chief Martin might suggest, but I think all of them, everybody should have to have some performance insurance. Now, as to how they get that, I think this committee could make some head-

way with the Bureau of Indian Affairs, or other similar BIA guarantees. But I think everybody that the Government does business with, as a taxpayer, should be qualified to deliver or pay up if they don't.

Senator COCHRAN. Mr. Bennett, any reaction to that?

Mr. BENNETT. My experience in construction of projects, I think it's always been a requirement. And I can understand, being in the position I was in, I have to protect the best interests of the construction company, but also to ensure that that project was going to be built within cost. And I think that's the purpose of the bonding. And I think that we have to protect the people involved. If we're using Governmental funds, certainly we're not going to get into a situation where it's not bonded. I really believe in bonding. The cost of bonding is another matter. You know, we know the escalating costs of surety. And I really feel that we ought to look at the other alternative of perhaps phase bonding as a solution to it.

Senator COCHRAN. Thank you.

At this point, I would like to have the testimony submitted by Mr. David Getches, and Mr. Charles Wilkinson, Professors of Law at the University of Colorado School of Law placed in the record.

[Prepared statements of Mr. Getches and Mr. Wilkinson appear in appendix.]

Senator COCHRAN. Thank you very much. This is our final panel of witnesses for today's hearing. I want to thank you for being here. You've added a great deal to our hearing record, and our understanding of some of the practical problems that we'll run into in trying to encourage more preference for contractors on tribal lands, and we appreciate that opportunity to visit with you and discuss these things. And all those who've been here today, we thank you very much for your assistance to our committee.

Until the Chairman calls another hearing, this committee will stand in recess.

[Whereupon, at 4:18 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

Additional Material Submitted for the Record

OPENING STATEMENT

SENATOR KENT CONRAD
Senate Select Committee on Indian Affairs

May 11, 1989 Hearing:
S. 321, the Buy Indian Act Amendments of 1989

Good afternoon. On behalf of my colleagues on the Select Committee on Indian Affairs, I would like to welcome everyone to today's hearing.

There are two laws that authorize Indian preference in contracting: the Buy Indian Act and Section 7(b) of the Indian Self-determination Act. The purpose of these laws is to help spawn economic development in Indian country and to provide opportunities for Indian enterprises and Indian people. However, the potential for Indian preference laws to spurr economic development has never been fully realized.

I recently joined the Chairman, Sen. Inouye, along with several of my other colleagues on the Select Committee in introducing S.321, the Buy Indian Act Amendments of 1989 -- the subject of today's hearing. The amendments update, revise, and consolidate the existing Federal laws on Indian preference in contracting.

One of the most important issues confronting Indian reservations is economic development. Job opportunities on and around the reservation are a critical component of any effort to improve the social and economic well-being of Native Americans. Joblessness only exacerbates problems of alcoholism, suicide, and other family and social problems

that plague Indian reservations. And in many ways, jobs are the solutions.

The Buy Indian Act is only one tool to help Indian businesses, but it is an important one. We must be sure that it provides Indian businesses with the kind of help that they need to thrive and provide economic opportunity for Native Americans. S.321 is an attempt to do just that.

A variety of criticisms are often made of Indian preference laws -- among them the failure to set clear goals, the lack of consistent implementation, and the prevalence of "front" organizations which take unfair advantage of preference contracting.

S.321 attempts to address these problems in a number of ways. It clarifies the goals of Congress in enacting Indian preference laws; it consolidates current laws and broadens the scope of their applicability, and; it helps ensure that "front" organizations will be prevented from siphoning off resources that are badly needed in Indian country.

S.321 does not necessarily represent the ideal legislative product. In fact, a number of amendments have already been suggested. The purpose of today's hearing is to determine just how effective the current bill will be at improving the law, and where additional changes should be made.

To help us with our task today, we will hear from several witnesses. We will begin with the Honorable W.P. Ragsdale, Acting Assistant Secretary for Indian Affairs.

Today's second panel will consist of Mr. Edward Danks, President of the National Indian Contractors Association; Mr. Jefferson Begay, President of Amerind Construction, Inc., and; Mr. Richard Coando, Chairman of the Board of the Council on Tribal Employment Rights Organization.

Finally today, we will hear testimony from Mr. William Richardson, Director of the Office of Economic Development for the Mississippi Band of Choctaw Indians and Mr. George Bennett from the American Indian Business Development Consortium.

The Committee looks forward to hearing your testimony here today.

STATEMENT OF WILLIAM P. RAGSDALE, ACTING ASSISTANT SECRETARY - INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE HEARING OF THE SELECT COMMITTEE ON INDIAN AFFAIRS, U. S. SENATE, ON S. 321, A BILL TO REVISE PROVISIONS OF LAW THAT PROVIDE A PREFERENCE TO INDIANS.

May 11, 1989

Mr. Chairman and members of the Committee, I am pleased to present the views of the Department of the Interior on S. 321, the "Buy Indian Act Amendments of 1989".

We recommend enactment of S. 321 with the amendments described in this statement.

We note that the Justice Department, which is not testifying here today, would oppose enactment of this bill unless two additional amendments are made. The first concerns the hiring of expert consultants and witnesses by the United States for use in natural resource litigation undertaken by the United States, pursuant to its trust responsibility, for the benefit of Indian tribes or individuals. The second concern relates to the constitutionality of section 23(f)(2)(G) of the bill, which imposes restrictions on the Secretary of Interior's appointment of members to the "Advisory Committee on Indian Preference." We defer to the Department of Justice on these issues.

Contracting with Indian economic enterprises represents one way that the Federal Government can help alleviate the wide spread unemployment and under employment that is common to many Indian reservations. The Act of June 25, 1910, which is commonly referred to as the Buy Indian Act, is one of the vehicles that can be used to help improve this deplorable situation. However, the original purpose of this law is somewhat difficult to discern. As a consequence, modern legislation that inarguably

expresses the will of Congress and takes into consideration the situation that exists today, not the situation that may have existed in 1910 is needed. For this reason, S. 321, if amended as we suggest, could fulfill this need.

BACKGROUND

S. 321 includes an extensive revision of the so called Buy Indian Act which is codified in 25 U.S.C. 47 as follows:

> "So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

Similar provisions appeared in appropriations acts as early as 1886 but were not made permanent until the Act of April 30, 1908 (35 Stat. at 71) and the Act of June 25, 1910 (36 Stat. at 861). The provision also applies to the Indian Health Service under the provision codified in 42 U.S.C. 2001(a).

A companion provision (which is not amended by S. 321 and which does not apply to the Indian Health Service) was enacted in section 11 of the Indian Financing Act Amendments of 1984 and is codified in 25 U.S.C. 47a. It provides:

> "The Secretary [of the Interior], in his discretion, may require security other than bonds required by the Miller Act (40 U.S.C. 270a) when entering into a contract with an Indian-owned economic enterprise pursuant to the provisions of the Act of June 25, 1910 (25 U.S.C. 47), for the construction, alteration, or repair of any public work of the United States: Provided, That, the alternative form of security provides the United States with adequate security for performance and payment."

Although the Buy Indian Act authority was not used extensively until 1963, the Bureau of Indian Affairs now contracts extensively with Indian organizations. However, since 1975 our most significant authority for such contracting is the Indian

Self-Determination Act under which we entered into contracts with tribal organizations valued at some $376 million in FY 1988.

Under a provision in the Bureau of Indian Affairs Manual, the BIA is required to contract under the Buy Indian Act (in cases where a tribe has not invoked the Indian Self-Determination Act) unless an Indian firm is not available or a waiver is granted by the Assistant Secretary for Indian Affairs. Under the Buy Indian Act that year we entered into 179 contracts with Indian firms totaling over $54 million. Our contracts with non-Indian firms in FY 1988 totaled about $58 million. Also in FY 1988, we had some 51,000 minor transactions (i.e., less than $25,000 each) totaling over $79 million but we have no breakdown of those transactions as to Indian and other.

Most of the FY 1988 Buy Indian Act contract dollars ($38 million under 63 contracts) were for the construction of roads and bridges and the others were for a variety of services ranging from architectural and engineering design to trash collection.

CONSOLIDATING ANOTHER BUY INDIAN ACT

Section 23(b)(1) of the Buy Indian Act as revised by section 3 of S. 321 restates (but the bill does not repeal) with minor changes the provision codified in 25 U.S.C. 450e(b) which provides:

> "Any contract, subcontract, grant, or subgrant pursuant to this [Indian Self-Determination and Education Assistance] Act, the Act of April 16, 1934 * * * or any other Act authorizing contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible-
>
> (1) preference and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
>
> (2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to

Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 [25 U.S.C. 1452]."

INDIAN EMPLOYMENT BY INDIAN CONTRACTORS

Section 2(b)(1) of S. 321 declares "a major national goal" of ensuring that "the procurement of goods and services on Indian reservations or otherwise for the benefit of Indians shall be carried out in a manner that achieves the maximum benefit for Indian employment and business development". However, it may not be clear that the Indian employment, training, and subcontracting preference requirements of section 23(b) apply in all cases to the carrying out by an Indian firm of a contract let under the Buy Indian Act. Therefore, to avoid any dispute we recommend that in section 23(b)(1) of the restated Buy Indian Act on page 3, line 21 the words "this Act," be inserted after "provided under".

TRIBAL EMPLOYMENT AND CONTRACTING PREFERENCE LAWS

Section 23(b)(2) provides for tribal enforcement of a tribe's "subcontracting and employment preference requirements" in lieu of "the preferences established by the Federal agency". We believe that such a provision is consistent with the Supreme Court's decision in U.S. v Mazurie, 419 US 544 (1975) upholding a delegation by the Congress to tribes of a portion of the Congress' constitutional authority to regulate commerce with tribes.

To make it clear that the reference to tribal "subcontracting * * * requirements" does not include requiring a contractor to subcontract or any activities other than the selection of a subcontractor, we recommend that on page 4, lines 20 and 24 the

word "subcontracting" be stricken and replaced by "subcontractor selection" in both instances.

To be correct, we recommend that on page 4, lines 22 and 23 the phrase "the preferences established by the Federal agency" be stricken and replaced by "the preferences established under this section".

We also note in section 23(b)(2) on page 4, lines 15 and 16 language requiring a determination whether a tribe has imposed preferences "generally comparable" to those imposed by "this subsection". On page 5, lines 4 and 5 the reference is to a determination that a tribe has imposed a preference "generally comparable" to those under "this section". In both instances we believe that the intent is to refer to "this section" and page 4, line 16 should be amended accordingly.

The definition for the term "Indian controlled enterprises on page 8, lines 18 through 23, may be too restrictive. Therefore, we suggest the definition be amended to read as follows:

> "Indian Economic Enterprise" means any business entity (whether organized for profit or not) which: (1) is at least 51 percent owned by one or more Indian(s) or (an) Indian Tribe(s); and (2) for non-tribal ownership, has one or more of its Indian owners involved in daily business management of the economic enterprise; and (3) has the majority of its earnings accrue to such Indian person(s) if organized for profit. These requirements must exist: when an offer is made in response to a solicitation; at the time of contract award; and, during the full term of the contract. For not-for-profit enterprises, the majority of the board of directors (or other controlling body) must be Indian persons."

Finally, we recommend the addition of a definition of the term "products of Indian industry", to make it clear that the

term includes anything which Indian industry may produce, either now or in the future. We recommend the following definition be added to the bill:

> "The term "products of Indian industry" shall be interpreted broadly, so as to include anything which Indian industry now or in the future may produce, including supplies, services, construction, and intellectual property."

OTHER CONCERNS

We believe that section 23(c)(2) on page 5 is not clear as to whether authorization by the Secretary of the Interior is required for each use by other Federal agencies of the preference authorized in section 23(c)(1) or only those under section 23(c)(3)(A). An analysis of the bill which we have received interprets the provision as discretionary authority applying to contracts not subject to the mandatory requirement of section 23(c)(1) but such an interpretation is not in line with the bill language. In any event we do not see the need for such authority being given to the Secretary of the Interior as to contracting by other Federal agencies but we defer to the Office of Federal Procurement Policy as to whether that Office should have such authority since it is responsible for Government-wide procurement regulations. The provision should be deleted or revised.

In section 23(c)(3) on page 6, we do not understand which contracts would be included in item (A) ("furthers the special relationship between the United States and Indians") that would not also be included in either item (B) ("Indians are the primary beneficiaries of the contract") or (C) ("the majority of the contract activity takes place * * * [in] an Indian reservation"). The distinction should be clarified or the item deleted.

7

We believe that the procedure described in section 23(c)(5) on page 7, lines 1 thru 13 should be the preferred method for contracts in excess of $25,000 because it provides the best means of determining the market price for the services or products involved and provides a preference for Indian firms. We understand that the Department of Housing and Urban Development has been using a procedure such as described in paragraph (5) under the authority in 25 U.S.C. 450e(b) mentioned above. In addition to providing a credible method of determining a price for a contract, such a method would -

(1) increase competition and reduce or eliminate criticism of awarding contracts to Indian firms with no opportunity for others to compete;

(2) create an incentive for Indian firms to "sharpen their pencils" and thus become more competitive; and

(3) enable Indian firms that don't compete for other than Government contracts to do so by learning how to compete.

Therefore, we recommend-

(1) deletion of "(4)(A) A Federal agency shall" on page 6, line 10 and inserting in lieu thereof "(4) A Federal agency may";
(2) deletion of subparagraph (B) on page 6, lines 22 thru 25; and
(3) rewriting the first sentence in paragraph (5) on page 7, lines 1 thru 4 to read as follows:
"If a Federal agency does not limit competition as authorized in paragraph (4), the agency shall award the contract after full and open competition under this paragraph."

We have two problems with the first sentence of paragraph (6) starting on page 7, line 14. First, the "extraordinary circumstances" test for waivers of Indian preference under the Buy Indian Act is subject to dispute as to meaning. Second, the provision apparently would not permit waivers by a Secretary,

Under Secretary, or Deputy Secretary because they are not "comparable to the rank of an assistant secretary of a Federal department." We recommend that the sentence be rewritten as follows:

> "The preference requirements of this section may be waived by the head of a Federal agency as to a specific contract if the waiver is in the best interest of the Indians or where there is an overriding national interest. An agency head may not delegate authority to waive that requirement to other than an Under Secretary, Deputy Secretary, Assistant Secretary or equivalent official of the agency."

We recommend that the second sentence of paragraph (6) starting on page 7, line 18 be deleted because it duplicates a similar requirement of the Office of Federal Procurement Policy.

On page 8, lines 9 thru 11 reference is made to "construction (within the meaning of the Indian Self-Determination Act)". Section 4 of the Indian Self-Determination and Education Assistance Act does not define the term "construction" but does define "construction programs". We recommend that the bill be amended accordingly.

Regarding the "Advisory Committee on Indian Preference" mentioned on pages 9, 10, and 11 of the bill, we defer to the Department of Justice's constitutional concern. Beyond that we believe that such a Committee is not advisory because it would be authorized to certify enterprises as eligible for preference under the Buy Indian Act. We believe that a certification approach with penalties for false certifications is a more efficient method. The other functions for the Committee do not warrant the new organization and cost involved. Therefore, we recommend deletion of the provisions relating to the Committee and addition of a provision such as the following:

"(f)(1) Subject to paragraph (2), an agency may accept the following certifications as qualifying an enterprise as an Indian-owned enterprise or Indian-controlled enterprise as defined in this section:

(i) a certification by an authorized officer of the enterprise that it is eligible for an award and qualifies as an Indian-owned enterprise or an Indian-controlled enterprise under this section; and

(ii) in the case of an entity other than an Indian or Indian tribe, a certification by the Indian(s), tribe(s), or certified Indian-owned enterprise(s) or certified Indian-controlled enterprise(s) who are owners of the entity as to their ownership interests and the qualification of each Indian owner as an Indian as defined in this section.

"(2)(A) An agency need not accept a certification under paragraph (1) and at any time may require such additional evidence of eligibility as the agency finds desirable. An agency may disqualify an enterprise based on such evidence or on the failure of the enterprise or an owner to submit such evidence.

(B) An agency may disqualify an eligible Indian enterprise from receiving an award under this Act during a period that it is debarred from contracting with an agency.

(C) Any affected person may challenge the eligibility of an eligible Indian enterprise or a certification under this section and the agency shall undertake such inquiries as may be appropriate, including but not limited to requesting information under clause (1) of this subsection.

"(3) In case of a false certification or the submission of false or misleading evidence or information under this section, the United States is entitled to the return of amount paid to an eligible Indian enterprise because of an award under this section. This remedy is in addition to any action under section 1001 of title 18, United States Code or other provision of law."

ADDITIONAL PROVISIONS

To preclude any conflict with the Indian Self-Determination Act which requires contracts by the Secretary of the Interior or the Secretary of Health and Human Services, we recommend that a new subsection be added to the revised section 23 as follows:

"(h) This section does not alter the requirement for the award of a contract, grant, or cooperative agreement under the Indian Self-Determination Act to the recipient designated by a tribe."

We also recommend that the revised section 23 be made applicable to the Osage Tribe and the Five Civilized Tribes by amending section 33 of the 1910 Act which makes that section inapplicable to these Tribes. The amendment would be as follows:

> "Sec. 4. Section 33 of the Act of June 25, 1910 (36 Stat. 863; 25 U.S.C. 353) is amended by striking out "The provision of this Act" and inserting in lieu thereof "The provisions of this Act (except section 23)".

We recommend that the bill be amended to repeal (1) the 1908 Buy Indian Act provision cited as a source for the codified provision in 25 U.S.C. 47 and (2) section 7(b) of the Indian Self-Determination and Education Assistance Act. Both of these provisions would be unnecessary after enactment of S. 321. The amendment would be as follows:

> "Sec. 5. The following provisions are hereby repealed:
> (1) The last proviso in the first paragraph under the subheading "SECRETARY" and heading "I. GENERAL PROVISIONS" in the Act of April 30, 1908, ch. 153, 35 Stat. 70, 71 (25 U.S.C. 47); and
> (2) Section 7(b) of the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 2205 (25 U.S.C. 450e(b))."

The current Buy Indian Act which is codified at 25 U.S.C. 47 was enacted as a portion of section 23 of an Act of June 25, 1910, chapter 431, session 2, 61st Congress, "An act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes." That Act contains thirty-three sections, only one of which relates to procurement of the products of Indian industry. We believe that in order to avoid confusion in the future when the Act of June 25, 1910 might be amended or repealed (and the Buy Indian Act might thereby be inadvertently repealed), it would be advisable to repeal section 23, and to make these proposed amendments the "Buy Indian Act of 1989".

This concludes my prepared statement and I will be pleased to respond to any questions the Committee may have.

TESTIMONY OF EDWARD M. DANKS, PRESIDENT

NATIONAL INDIAN CONTRACTOR'S ASSOCIATION

BEFORE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

ON MAY 11, 1989

Dear Senator Inouye:

Thank you very much for inviting us in to testify on this important piece of legislation. As you are aware, the National Indian Contractors Association has repeatedly offered suggestions to legislation that we feel will clean up the Buy Indian Act and potential and evident abuse of the Act itself.

For many of us in the National Indian Contractors Association and indeed those Indian businesses who are not members of the National Indian Contractors Assocation, the Buy Indian Act provides the primary opportunity for them to continue to grow and develop and contribute to their community.

Since the Suface Transportation Assistance Act of 1982 reauthorized the use of the Buy Indian Act for road construction activities, we have seen all sorts of abuses to the Act. This is

primarily due to unclear regulations, misinterpreted congressional intent and sporadic and inconsistent implementation of the Act. Indeed the Special Committee on Investigations of the Select Committee on Indian Affairs has taken a very indepth and revealing look at those kind of activities. We think that this has been neccesary and it has been quite helpful. The language in proposed Senate 321 will go long way in cleaning up those activities and it offers a refreshing revitalization of the Buy Indian Act itself. To that end we commend the staff of the Select Committee on Indian Affairs and the committee itself in taking on this legislation that is so extremely important to those of us who live and grow by the very fact of it's existance.

In the past, we have had an opportunity at several different occasios to make reference to concerns that we had with the Buy Indian Act itself and now the language that has been prepared and proposed in this legislation addresses many of our concerns. We are particularly encouraged to see the language in the Bill that differentiates between construction activities and the ownership of the Indian enterprise that are involved as opposed other activities that are non-construction related that allow for a lesser ownership of the Indian enterprise. To our mind this goes a long way towards addressing the economic development concerns that many people had, as it relates to manufacturing enterprises or other such activities that take large substantial amounts of capitalization and expertise in order to develop.

We are a strong supporter of the advisory committee on Indian preference. This particular provision in the Bill is one of it's strongest features. As there are so many different federal agencies that work directly with Indian tribes, representatives from those respective agencies, serving on this committee is essential.

One of the primary criticisms of the Buy Indian Act has been the varied approach to the implementation of the Buy Indian Act by the various different federal agencies that serve Indian country. A singular and understandable approach to implementation of the Buy Indian Act will certainly be helpful. Equally, and perhaps more important, is the inclustion of Indian business leaders and Indian tribal representatives to serve on this particular committee. In particular the Indian business community can offer insight to the daily trials and tribulations that goes with participation in the Act. Hopefully the input of those particular members, along with the Tribal representatives, coupled with the input from the representatives of the various federal agencies should give this committee a dynamic impact on the Buy Indian Act itself.

We are hopeful that this particular committee can be organized in short fashion because as we speak today, things are happening in Indian country and people are begging for direction. We urge that a directive be given to the advisory committee that

requires it to report to the Senate Select Committee on Indian Affairs on the impact of the Buy Indian Act. We feel it is important to be kept abreast of the activities of the committee and the findings it might have with respect to implementation of the Act.

An area of concern that has not been specifically addressed in this legislation is the matter of bonding. In our mind, bonding has been and remains a problem that must be addressed. With the emergence of several organizations representing individual sureties, the bonding problem for small Indian firms has eased somewhat. However, problems tend to plague that resource, as well, and it is not secure.

For a variety of reasons, Corporate Surety companies seem to be very reluctant to issue surety guarantees to reservation work. As we understand, there are several reasons:

1. The lack of a clear definitive role of the TERO organizations. TERO organizations are extensions of the Tribal Government itself. As such, they can shield themselves with sovereign immunity when decisions are made by the TERO organization, that might be misguided and carry a substantial cost. To what forum does a contractor or bonding company address requests for monetary damages, in the case where those requests are valid?

2. Bonding is a business. A surety company must have a profit or it will not bond a project.

A bond is insurance that a construction job will be completed and in accordance with the contract. In order to insure or bond a project, a bonding company must know the risks and be able to assign costs to the risks. In any given state a bonding company knows the risks based on past experience. In a state or federal court the laws are known and their application in any given situation is known. Due process of the law is given. Risks can be calculated.

On the reservations the risks are not known in a static manner due to questions regarding checks and balances between the Tribal Council and the Tribal Court systems. If there is an administrative process set out in regulations, there is no assurances that those regulations will be followed. There is an attitude that Due process is not guarenteed in the tribal administration process nor in the tribal court. There is no appeal to the federal court from civil process in tribal court. Therefore, the risks to the bonding company are unknown and for their allowable rate of return bonding companies do not believe the return is worth the unknown risk.

3. Many of the assets of Indian Contractors are in trust status with the US Government.
4. The track record of the BIA in regard to the many construction claims brought against it.
5. In most cases Indian Contractors are first generation and do not have a well established track record.

These are certainly not the only concerns, nor are they the most important. The list could go on for some length. I'm sure you've heard them all so we will not belabor the point.

We are prepared, on the otherhand, to offer some suggestions to address this problem of bonding. We believe that a direct bonding program, coupled with the Buy Indian Act construction activity, is necessary. The Bureau of Indian Affairs, through the Indian Finance Act has the legislative authority to provide surety bond assistance. However, we are not aware of any regulations that have been published that implement that provision. It is our belief that a direct bonding program, made available to pre-qualified legitimate Indian Business firms, for exclusive use on "Buy Indian" contracts, is essential. Furthermore, we contend that this program would actually save the government money. When you factor in the cost of bonding for most Indian contractors is 4-5 times greater than normal industry costs. These costs must be passed on to the government.

Consider this: The 1989 Construction budget of the Bureau of Indian Affairs, including Road construction is 220 million dollars. 1990 is projected at about 221 million. In two years time that equals 442 million dollars worth of construction. Bond costs on that amount of work using current Indian contractor average premium rates of 4% equals $17,600,000.00 The normal construction industry bond premium rates of 1.2% equals $5,300,000.00. The difference is $12,300,000.00.

We suggest that 12 million dollar savings to the government is worth a serious planning effort. We believe that for a fraction of that cost a specific bonding program for Indian contractors could and should be designed. In fact, we contend that resolution of the bonding problem would virtually "wipe out" "front" companies.

Virtually every BIA agency office has a credit office. The network for a "grass-root" bonding service is in place. Working with the local tribal offices and local Indian businesses, we believe that this function could be performed at that level. Similar to Insurance/Bonding agents for major corporate surety groups, the credit office personnel deal with a wide range of financial matters peculiar to Indian finance. If more personnel and training are required we believe it would prove worthy of the effort, not only would it provid more Indian jobs, directly, but

it would also provide a desperately needed service to Indian businesses on a "grass-root" level, which in turn, would enhance economic development in Indian Country.

We believe that the BIA already has the enabling legislation to accomplish this task, serious attention in this regard is necessary.

In conclusion, Mr. Chairman, again thank you very much for this opportunity to offer comment on this vital legislation. Senate Bill 321 demonstrates the true committment of yourself and the members of your community towards making the Buy Indian Act a workable, usable instrument for economic development in Indian country. To that end we commend you very much.

Thank you ,

Edward M. Danks

Edward M. Danks
President

EMD/rkc

BUY INDIAN ACT. PAGE 1 J.L. BEGAY

STATEMENT OF JEFFERSON BEGAY
ON THE
BUY INDIAN ACT

May 11, 1989

Mr. Chairman, my name is Jefferson Begay. I am a Navajo Indian from Teesto, Arizona on the Navajo Indian Reservation. I make my livlihood as a general contractor building houses, roads, and community facilities on Indian reservations in the southwest and in the metropolitan Phoenix area. I have been in the construction industry since my graduation from Arizona State University in 1974 with a degree in Construction engineering and management. My work experience has been with large to medium sized construction companies in the Phoenix area. I "grew up" in the industry taking lessons from professionals with whom I continue to associate.

I started my business in 1985 without the assistance of the Bureau of Indian Affairs, the Small Business Administration, my tribal government, or any other business assistance agencies. Most of my business work experience has been with Indian tribal governments or Indian Housing Authorities building federally funded projects under the Buy Indian set-aside program. Not all of my work, however, has been federally funded. I also provide services to the private sector. The start, and the current success, of my business can be attributed to being at the right place at the right time, hard work, good advise, and the grace of God.

I. INTRODUCTION

In 1985 I assisted a savings and loan association that was in trouble with an Indian "front" construction company. I helped them complete a construction contract which they had bonded with a $750,000 letter of credit. Upon completion of the project I asked the bank, as a favor, to finance me on construction work. I entered into a business relationship with them which proved to be successful for both parties. To this day my company continues to provide construction services to this institution although we no longer borrow money nor utilize their letter of credit services.

This business transaction is one I consider to be the prototype business relationship between non-Indian and Indian business enterprises. The motivation for this transaction was money. The bank, to limit their losses; and mine, to get into business. It was without tax incentives nor any other fiduciary benefits most non-Indian firms must have before they will do business with Indians. The Indian must always deliver incentives more favorable to the non-Indian counterpart, usually money.

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This amendment to the Buy Indian Act will have a profound impact on my livlihood. Of great concern to me is what the effect will be on bonding. Bonding is of tremendous importance to the Indian contractor, without which they will turn to non-Indian companies for assistance and the likelihood of "front" operations become inevitable.

II. STATEMENT OF THE PROBLEMS

The recent hearings on the fraud in Indian America, which this Committee was instrumental in providing to the American public and the Indian communities information on what was actually happening to their money. It revealed that the problems were being ignored by all responsible parties. It revealed that the intent to utilize Indian enterprises was still the desire of Congress like it was in 1910 when "beads, bones, and blankets" were scales of economy with our forefathers. It revealed that the Federal government never took the initiative to effectively implement the Buy Indian program to benefit the Indian, but became more concerned with the bureaucracies of implementation. I have heard both the Bureau of Indian Affairs and HUD officials declare that they were aware of the problem of Indian "fronts" but could do nothing about it because "their hands were tied."

1. Self-Certification does not work:

The Federal Government, specifically the Bureau of Indian Affairs has been a major part of the problem. They were given primary responsibility for implementing the Buy Indian Act of 1910 to provide Indians an opportunity to become a part of the American free enterprise system. They were given this responsibility without any guidelines as to the extent of their responsibilities **and** the money to carry the task out, so say Bureau and HUD officials that I have talked with.

Although this law has been around for 79 years the regulations are still being developed. I was under the impression that the law had been more recent than 1910. Today they talk about it as if **it was** a recent dictate of Congress to provide services to Indian communities. They say, if it was not for Indian "fronts" much of the money allocated for the Indian set-aside program would not have been spent . The modus operandi, it makes you believe, is to spend the money as fast as they can get it before the government takes it back. Delivery of roads, buildings, and other construction projects to the Indian tribes consequently have been a program of haste.

It's **as** easy solution for the Bureau to shift the responsibility for certifying Indian contractors to the contractors' themselves. If the government is not going to verify the "Indianness" of a company the temptation becomes much too easy to get work by saying that you are an "Indian" contractor. Penalties apply but who is responsible for catching the culprits?

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I can sympathize. The Bureau gets it from everyone, especially the Indians receiving hastily packaged projects, delivered with haste under the guidelines of hastily developed regulations.

2. Bonding is a problem for Indians:
Bonding, or the lack thereof, has been the primary reason Indian "fronts" come into existence. Without bonding they were not able to bid on Buy Indian work. In order to obtain bonding for construction, a company must have a substantial amount of money in the bank to satisfy the bonding company. Most Indian firms do not have money in the bank when they get started, if they do it isn't enough required to bond most Indian set-aside projects. The quick and easy way into business has been to "joint-venture" with a non-Indian with both money and bonding. This service provided by the non-Indian firm has been very expensive for the Indian contractor.

Today I see these known "fronts" bidding smaller projects or not bidding at all because their benefactors have dropped out of the Buy Indian program. These Indian contractors now have limited bonding or no bonding at all to bid on projects they used to bid. This means their retained earnings are showing completely different from what it was when their backers were a part of the books. It doesn't take a CPA to figure where all the money went. It obviously did not go to the Indian, otherwise they would be bonding the same volume of work.

It is difficult for Indian companies such as mine to get bonding from corporate sureties. Acquiring Treasury listed corporate bonds is like asking Congress to increase the national deficit for the sake of increasing the Gross National Product. They just do not feel compelled to risk their sureties with minority contractors, especially Indian contractors. Our predecessors have left a bad track record by which we are judged today. The following bond forms are available to us and should continue to be acceptable.

Letters of Credit
I was fortunate to have had the confidence of a savings and loan association to provide letters of credit to my firm. Their faith in me, and the standard business agreements were sufficient for them. Without their willingness to take this "risk" I would not be in business today. However, not all owners accept letters of credit. You'll be surprised how little is known of the various surety forms available to the owner, by private, governmental, and financial institutions. It has been a major problem for us in trying to get our letters of credit accepted by various owners and agencies.

Corporate bonding
Approximately one year after starting my business, I went to the Bureau of Indian Affairs to seek financial assistance under the Indian Financing Act. My intent was to put money in the bank to use as leverage in acquiring corporate bonding. I was not able to receive BUY

assistance from the Phoenix Area Office nor the Navajo Area Office, my tribal area office.

My office is located in Tempe, Arizona, not on an Indian reservation. I was denied by the Phoenix Area Office because I am a Navajo Indian, Navajo Indians have their own Area Office located in Window Rock, Arizona. I was denied by the Navajo Area Office because my business did not directly impact the Navajo Indian Reservation with an office located in Tempe, Arizona. We have, however, economically impacted the Navajo, Tohono O'odham, Yavapai-Apache, Quechan, Gila River **Dresslerville and Ft. Dushene** Indian communities. I got lost in the bureaucratic shuffle and could not get a straight answer out of the two Area Offices.

I went to the Small Business Administration to seek bonding assistance under their guaranteed bonding program. I was told by SBA that my company needed more experience and some money in the bank, a line of credit was not sufficient. I was told to come back in a year or two when we had gained both.

My company had been in business three years when I went back to the Small Business Administration through a bonding agent that thought my experience and financial statements looked good to qualify for the program. I was told that my company was too successful for the program because we had exceeded the gross average volume allowable per year. The limit was $3.5 million, we had averaged $3.6 million during the last three years! The exasperation is overwhelming.

Individual sureties

I had no choice but to go to the individual surety market for my bonding. This is the only source of bonding that is easily available, but at a very high premium. Today there is a move to restrict individual surety bonds from being used on Federal projects because they have not been adequately audited by the surety agents and the Federal government is not adequately assured.

I personally have had problems with this bond form. On two projects the individuals supplying the bonds encountered financial problems. They decided to withdraw their performance and payment bonds and informed the Bureau of Indian Affairs of their decision to do so. The problem occurred because the individuals failed to disclose a true statement of their financial position. My surety company had not verified the assets presented. One of these individuals is going to jail for not paying his income taxes.

Individual sureties present a risk for the government and especially the Indian contractor. They are expensive, a cost that is carried forward to the owners. These owner's are Indian tribe's and the Federal government. The high premium limits the competitiveness of those contractors using these personal bonds. Fortunately or

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unfortunately, which ever the case may be, this is the only bond form readily available to the Indian contractor.

I would like to see relief from risk presented by such sureties. Quite a paradox; parties encumbered to provide security to both the contractor and the owner are not very secure.

Thorough auditing and qualification checks must be made to allow individuals to use their private holdings to guarantee federal projects. The corporate bonding companies are trying to monopolize the bond marketplace by eliminating the individual surety market. The restrictive attitude of corporate sureties with Indian companies only promulgates a reaction by Indian contractor's to go to more expensive bond forms.

3. Certification is still a problem

The Government did not set up to handle certifications. They have been made responsible for a procedure that takes much more auditing time and money anticipated to verify that companies, individuals, and agreements are all truly "Indian". With all the good intentions of Congress, 1910 Indians did not have much in the way of opportunities to participate in the free enterprise system of this great country. Beads, blankets and buckskin were the limit of trade. It did not require certification to determine if an Indian was actually managing and operating the business. It did not require bonding, financial disclosures, or licenses.

Certification has been very tough on legitimate Indian contractors and very open for the obvious Indian "fronts." One assumes that the Federal government is determined to protect the interests of the Government and not the Indian business community. Recently the BIA has gone to the self-certification process, the burden of proof now lies with the contractor himself to prove that he is truly "Indian." The Bureau has declared itself not responsible for auditing these firms. Today there are several questionable self-certified companies that were low bidders in the Phoenix and Albuquerque area.

4. TERO offices can be too protective

Indian contractors do not have to be mandated to utilize Indian work forces. They empathize with the employment, economic, and other problems inherent on Indian reservations. They know what it's like to be Indian and out of work. TERO offices were established to require non-Indian firms to use local labor and subcontractors. I agree that local labor and subcontractors are generally not what you would expect to find in the metropolitan areas. They are not as experienced and not as readily available. Indian subcontractors are generally not strong financially,consequently, will request assistance to finance their payroll, materials and equipment or other unusual business assistance. My company has suffered some losses in its good faith attempt to assist Indian subcontractors.

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Indian tribes want all their people employed and all their subcontractors working on construction projects located on their reservations, however, many are not qualified to perform the work at hand. Tribes must understand the nature of the business and their responsibilities to business entities working on their reservations. The burdens of compliance with tribal labor and subcontract utilization requirements generally adds cost to the project. The Navajo Reservation, my reservation, is overburdened with regulatory controls on labor and Indian (Navajo) preference, and business preference taxes. They are all intended for good purposes, but I would guess that projects on the Navajo Reservation cost five to ten percent more than they should because of these controls.

III. RECOMMENDATIONS ON THE NEW BUY INDIAN ACT

1. Certification by the Advisory Committee on Indian Preference

In essence, the self-certification process allows the continuation of what was before. It does not eliminate Indian "fronts", it instead promulgates them. The Advisory Committee on Indian Preference to qualify Indian contractors is an excellent remedy, but only if they are empowered with enforcement and penalty jurisdiction.

2. Guaranteed Bonding Program

If a guarantee was in place for the bonding companies they would be less reluctant to provide bonds to the Indian contractor. Who is to qualify for these bonds would have to be considered. The basis for sureties providing bonds is money in the bank. The Federal government would have the option of providing letters of credit to the contractors bank or to have a pool of dollars to guarantee the bonds.

Nothing is free, and the Indian contractors' must be liable for something. If a loss occurs the Indian contractor must also see the losses. Without corporate bonds being available, and individual sureties become restricted, there will not be a need for the Buy Indian set-asides in construction. There won't be any Indian contractor's around to bond the projects. I strongly recommend that the Guaranteed Bonding Program be set in place with the 100% ownership stipulation. This means that the Indian Financing Act section on Guaranteed Bonds must be combined with the Buy Indian Act to facilitate this program.

3. Ownership Requirement at 100%

There are always stipulations and constraints, this too has its conditions. The Guaranteed Bond Program must be in place, otherwise this ownership clause will become restrictive. As previously mentioned, there aren't too many contractors' that can afford corporate bonding. Many of us are truly small and disadvantaged minority contractor's. Ownership any less than 100% invites opportunism.

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4. Joint-Ventures

Joint-ventures will occur if the Guaranteed Bonding Program is not in place. Also, if the guaranteed limits on bonding do not meet the bonding requirements of Indian construction work then joint-ventures will surely become commonplace again. This must be carefully contemplated in order not to restrict the Indian contractor and burden the Advisory Committee on Indian Preference with certification a multitude of requests from across the country. I suggest that the bonding limits be unlimited. The less opportunity we have for joint-ventures the less opportunities of corruption and fraudulent activities in Indian contracting.

Joint-venturing with non-Indian firms should be allowed only if the Advisory Committee on Indian Preference has previously approved the venture. A stipulated time period should be mandated prior to bidding on Indian projects. Ideally, if the amendment sets strongly on the 100% Indian ownership requirement, joint-ventures will not be necessary.

5. Other Federal agencies

Require that federal agencies provide work under the Buy Indian set-aside program if they are impacting an Indian community or reservation. This includes all federally funded projects for school districts, remedial environmental waste, reclamation, and other Indian reservation projects.

Require all Federal agencies to adequately advertise all Indian projects so that substantial response is received from the Indian business community.

6. Indian Business Advisory Panel

Establish an Indian Business Advisory Board to work in conjunction with the Advisory Committee on Indian Preference. The Advisory Board will require input from the Indian business community. They will need assistance in determining what is realistic and that which is not. I recommend that an advisory panel of Indian contractors be appointed to assist the Advisory Panel on matters pertaining to Indian construction contracting. This would require additional funds but the input would be valuable and the savings could be enormous.

7. Individual surety bonds

Individual surety bonds should continue to be acceptable. I does require controls and auditing costs, but the elimination of this surety form will also eliminate many small Indian contractors.

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V. SUMMARY/CONCLUSION

I don't want to keep pounding on the issue, but Indian reservations are years behind the rest of the Nation in all aspects of economic, social and physical development. As a former tribal planner, I realized that the obvious solution is to give opportunities to the private sector. Let people do for them selves what the tribal governments are trying to do for their people. Private sector development takes money and Federal dollars are as not available. Tribal governments must go hand-in-hand with off-reservation financial institutions. Off-reservation financial institutions must see some security for their dollars before

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they will risk this business. They need good business contacts on these reservations before they will commit their bonds, insurance, and dollars.

The Indian contractor, thus, plays a very important role in making this happen. They will be the catalyst to initiate the free enterprise system on these reservations. The flow of dollars generated by construction, the businesses established and the spending of dollars earned by the work forces will create a multiplier effect.

This piece of legislation is very important to those of us that would like to see our reservations become healthy places to live without want for the basic necessities of life. I sincerely appreciate this opportunity to express my concerns regarding this noteworthy remedy to our Indian contracting problems. I wish you success in your efforts. Thank you.

TESTIMONY ON S.321 "BUY INDIAN ACT AMENDMENTS OF 1989"

SUBMITTED TO
THE SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

SUBMITTED BY
THE COUNCIL FOR TRIBAL EMPLOYMENT RIGHTS

MAY 11, 1989

Mr. Chairman and members of the Committee, the Council For Tribal Employment Rights (CTER) wishes to express its deep appreciation to the Committee for the concern it has shown in moving forward so rapidly on this important piece of legislation -- "The Buy Indian Act Amendments of 1989." As we will discuss below, these amendments once enacted will not only remove the "front" cancer from within the Indian community but will contribute significantly to economic development in Indian country.

My name is Richard Coando. I am a member of the Shoshone Tribe, TERO Director on the Wind River Reservation in Wyoming and Chairman of the Board of CTER. CTER is the national organization of Tribal Employment Rights Offices. These offices, known as TEROs, are arms of the tribal government that use the tribe's sovereign powers coupled with the various Indian preference laws, to ensure the maximum use of Indian workers and companies on all economic activity on their reservations. Begun just 12 years ago by a few concerned tribes, CTER now has a membership of 119 tribes that have established TEROs on their reservations.

The TEROs focus on ensuring that Indian workers are hired and Indian businesses are used to the maximum extent possible when the federal government or any other entity spends funds or engages in economic activity on their reservations. Our goal is to provide access to Indian economic development opportunities by tapping into economic activity already occurring on reservations.

Unlikely though it seems today, when the TERO program first began 12 years ago, one found few Indian workers or firms on the numerous HUD, BIA and other federal construction projects occurring right on reservations; one found few Indian employees or firms working in the mines or oil patches that were exploiting Indian minerals; one found few Indian employees or firms working for major corporations that had large manufacturing facilities on or near reservations. The success the TEROs have had in turning this situation around shows how effective Indian preference can be in promoting Indian economic development. In FY-87, 100 plus tribal TEROs placed Indian people in 18,000 private sector jobs through the use of their Indian preference powers.

The Chief Medical Officer of the Indian Health Service recently highlighted the importance of ensuring that federal dollars appropriated for goods and services on reservations also provide maximum employment to Indian workers and firms. He said that if you look at the major causes of death among Indians today, -- alcoholism, suicide, homicide, -- you realize

that doctors, medicine, hospitals, etc. can play only a small role in reducing deaths from these factors. The real improvements, he said, involve socio-economic factors, what he said is just a fancy term for jobs. Therefore, he concluded, ensuring that the IHS dollars spent on reservations promote Indian jobs is not just an unrelated "do-good" program. To the contrary, it is an essential part of IHS's social and health program.

Maximizing Indian employment when federal funds are expended is just as essential to most other federal programs. It is difficult for Indians to make their rent payments to HUD if they are unemployed. It is difficult to persuade young people to complete their education when they see no employment opportunities in their future. This list can go on and on. Obvious as this may seem, however, the TEROs experience has also demonstrated that S.321 must be enacted into law if the full social and economic development benefits from the expenditure of federal Indian dollars are to be realized.

One of the surprises to us when the TERO program began was that while there were already federal laws in place imposing the same kinds of preference the TEROs were imposing through tribal law, they were being largely ignored by the federal agencies. The Buy Indian Act provides for preference in the award of prime contracts by the BIA and IHS, while Section 7(b) of P.L. 93-638 provides for preference in employment and subcontracting on any contract for the benefit

of Indians. However, while these laws were in place, we found that the federal government was doing virtually nothing to enforce them. And when the TEROs began using tribal sovereign powers to enforce tribally-imposed preference requirements, the greatest source of resistance was not the employers or unions but the federal agencies.

Over the past 12 years the enforcement record of the federal agencies and their willingness to work with the tribal TEROs has improved, though only after some difficult struggle. For example, the TEROs had to sue HUD in Federal District Court to get the agency to enforce the Section 7(b) preferences and to stop undermining the TERO program. But even today, Indians are losing many jobs and contracting opportunities that result from the expenditure of federal dollars on reservation because of inadequate federal enforcement of the existing laws. The most common excuses for the problems of non-enforcement and resistance are:

-- the agency priorities are to build houses, roads, hospitals, etc., not to provide jobs or economic opportunities; and

-- Congressional intent and the regulations are unclear as to who is responsible for enforcement and whose laws and regulations take priority in a conflicting situation.

We believe the enactment of S.321, with certain proposed changes that are discussed below (the full text of

those changes are set out in attachment A) will largely correct the present problems. First, the bill clarifies the preference laws and removes the ambiguities that federal officials have used as excuses for non-enforcement. Secondly, it changes the Buy Indian preference from a discretionary one to a mandatory one. Third, it provides the specific instructions on how the preferences are to be implemented, thereby taking away the discretion that federal agencies used to undermine the laws' intent.

Fourth, it creates a new body to coordinate the fight against fronts. As the Senate Investigating Committee disclosed, fronts are a prevalent problem and serve to hurt legitimate Indian firms and to harm the credibility of the Indian preference program. Experience has shown that neither the individual federal agencies nor the tribes have the time and sophisticated resources at their disposal necessary to uncover and prosecute the front companies that move from reservation to reservation and federal agency to federal agency. The proposed Advisory Committee, which we recommend be changed to a Commission with stronger powers, will centralize the effort and have the resources equal to the task.

In sum, we support all of S.321 particularly if it is amended by adopting the proposed minor changes set out in our Attachment A to this testimony. We would like to focus the remainder of our testimony on two specific provisions that are of particular interest to us. First, we strongly support the

provision designating the tribes as the lead enforcement agency on projects where both federal and tribal law impose similar Indian preference requirements. Right now there is a great deal of confusion when both tribal and federal preference requirements apply, confusion that has tended to reduce the effectiveness of both sets of requirements. One entity needs to be the lead agency, and the tribe, through its TERO is better equipped perform this role. It has full time staff located right on the reservation whose sole responsibility is to enforce preference requirements and who have been extensively trained by CTER, EEOC, and OFCCP. Making the tribe the lead agency is also a concrete way to put self-determination into action and to strengthen the government-to-government relationship that is at the heart of the United State's Indian policy.

Finally, there is ample precedent for such action in this area and in other civil rights laws. In 1984, the BIA adopted a policy of permitting the tribal TERO to take the lead on Indian preference on BIA projects. It has proven to be extremely successful, reducing conflict and confusion, promoting Indian employment, and developing improved cooperation between the tribes and the BIA, through a collaborative partnership.

Other civil rights laws also make the local entity the lead agency. Title VII of the 1964 Civil Rights Act requires that EEOC defer discrimination complaints filed with it to

state fair employment practices commissions. The 1965 Fair Housing Act requires HUD to defer housing discrimination complaints to state fair housing agencies. To help the tribes meet the new responsibilities that will be conferred on them by this lead agency provision of S.321, CTER will continue to provide training and assistance to the TEROs to make them as strong and as competent as possible.

The second provision we wish to focus on is one of the addition to S.321 we are proposing, (listed as a proposed new subsection 3(h) in our attachment). This provision would authorize the Secretary of the Interior to enter into cooperative human resource agreements with tribes in order to promote Indian employment at National Parks, BLM lands, and Bureau of Reclamation projects located near reservations. This proposed provision will give Interior the same authority that the Forest Service already has and which has proven to be an effective tool for increasing Indian employment in that agency.

To provide some background, several years ago, the TEROs and Forest Service met to discuss ways to increase Indian employment in the Forest Service. The tribes had high unemployment rates, tended to be located near national forests, and had a large pool of workers who were interested and experienced in the kinds of employment the Forest Service had to offer. The Forest Service, in turn, had a very low percentage of Indian employees and was seeking ways to correct the situation. The parties found the vehicle to address their

mutual needs in P.L. 94-148 (16 U.S.C. 565a). This section authorizes the Secretary of Agriculture to enter into cooperative human resource agreements with public and private agencies to perform forest-related work, where the Secretary determines such agreements will advance the public interests. Using the authority of this section, tribes and the Forest Service have entered into contracts under which the tribes hire work crews to perform temporary duties in the forests and are reimbursed by the Forest Service. Not only do these provide much needed immediate employment but they provide Indians with exposure to Forest Service jobs, entrepreneurial opportunities, and have thereby significantly increased the number of Indians seeking and obtaining career positions with the Forest Service.

Since there are also a large number of National Parks, Bureau of Reclamation projects and BLM lands near reservations, the tribes then approached those agencies to see if they would be interested in replicating the arrangements developed with the Forest Service. Given that these were Interior agencies and the Secretary of Interior has special responsibilities in regard to Indians', we thought that this was even more appropriate than working with the Forest Service. However, we found out that the Interior agencies, while eager to work with the tribes, lacked the authority that Congress gave to the Forest Service in P.L. 94-148. We are therefore requesting that the Committee add a provision to S.321, that would give Interior the same authorities that P.L. 94-148 gives to the

Forest Service. As with P.L. 94-148 the proposed provision make the use of this authority discretionary to the Secretary of the Interior. It will then be up to the tribes to persuade the Secretary to use that authority. However, given the mutually beneficial relationship P.L. 94-148 has produced between tribes and the Forest Service, we are confident that, if enacted, the proposed provision will produce major benefits for both tribes and the Department of the Interior.

In conclusion, we deeply appreciate the commitment this Committee has made to promoting Indian economic development through S.321 and other legislation and actions. We urge the Committee to act quickly on S.321, and that it adopt the proposed changes we have proposed.

Thank you.

WRITTEN TESTIMONY

on

SENATE BILL 321
"BUY INDIAN ACT AMENDMENTS OF 1989"

Held by the:

THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
Room 485 Russell Senate Office Building
Washington D.C. 20510

Presented by:

WILLIAM T. RICHARDSON, JR.
DIRECTOR
OFFICE OF ECONOMIC DEVELOPMENT
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May 11, 1989

Mr. Chairman, Senator Cochran, and members of the Committee, I am William Richardson, Director of the Office of Economic Development for the Mississippi Band of Choctaw Indians. The Choctaw tribe is located on 21,000 acres of reservation land in eight, mostly remote, communities throughout east central Mississippi. There are 5,000 enrolled members of the tribe.

Through the strong tribal leadership of Chief Phillip Martin, the tribe has developed over 375,000 square feet of manufacturing facilities and another 78,500 square feet of commercial space during the last 10 years. These facilities, six manufacturing plants, a shopping center, and a 120-bed nursing home, employ over 1,500 people and generate an annual payroll in excess of $25 million. Annual sales this year are projected to be approximately $55 million.

The effect of this leadership and subsequent growth is best illustrated by the fact that the per capita income of the tribe has increased by 192% since 1975 and the unemployment rate has been reduced from a level approaching 75% to a level slightly over 20%.

I have been involved in reservation economic development for the past five and one-half years. During this time I have had the pleasure of working with the Choctaw tribe in building what has to be the model for Indian economic development. I have also served

as a consultant for ten other tribes in the development of various business ventures. Throughout this period I have taken the opportunity to visit and interact with tribes located in almost every state. It is from these experiences that I base my testimony.

I am honored to have been invited to share with this committee my perspective on Senate Bill 321 -- a bill that will increase opportunities for Indian-owned business enterprises and promote self-sufficiency on Indian reservations.

Recently passed laws and Congressional activity in the area of special procurement programs for Native Americans foster one of the best solutions for stimulating reservation economic development. By creating a readily accessible market for goods and services, many Indian-owned and Indian-controlled businesses will be able to overcome the long standing obstacle facing most reservations -- that being the relationship of reservation lands to market demands.

A developmental strategy through which Federal agencies currently providing services on reservations can become potential customers for Indian-owned and Indian-controlled businesses will be creating not only a market for goods and services, but also offering an opportunity for Indian entrepreneurial development. This strategy is based on leveraging federal dollars that will benefit multiple end use recipients. The only flaw with creating

this market is that Uncle Sam is bogged down in bureaucratic details, rules, and regulations. A "Buy Indian" requirement that would remove some of the red tape procedures of these federal agencies will facilitate this strategy.

By leveraging federal dollars programmed to provide services and facilities for Indian tribes through procurement contracts to Indian-owned businesses, the net impact on reservation economies will not be limited to the agencies' services currently being performed, but these same dollars will provide additional benefits of job creation and accumulation of profits. This multiplier effect will serve to further the process of self-sufficiency.

Benefits of job creation and business opportunity can be measured in more ways than increased income and profits. The impact on the individual's self-esteem is immeasurable. Not being a sociologist, I am not qualified to offer conclusive testimony. However, I am sure all here will agree with me in the conclusion that increasing self-esteem will cause a reduction in alcoholism, suicide, medical expenses, and family problems. The treatment of these social-related problems is currently funded by Federal programs serving Indians. Through Senate Bill 321, a significant long-term side benefit will be realized and the historical socio-economic based problems fueled by poverty and low self-esteem will be reduced on Indian reservations.

The lack of career role models on the reservation is a developmental problem affecting the tribal youth. All too often there are no business or service career opportunities for the youth to observe as models. Aside from BIA or IHS employees, the youth have little exposure to the broad range of career selections found in non-reservation settings. This legislation would help develop more role models by stimulating new business ventures created to meet the demand of a new market place for goods and services.

A problem that exists on reservations not addressed by this bill is the shortage of capital, both by the tribal government and the individual seeking to enter business. This problem is brought to light in two ways through this legislation.

The first capital issue not addressed by this bill is the requirement for the Tribal governing body to establish an office to enforce subcontracting and employment preferences. Many tribes, the Choctaw included, do not have adequate resources to fund such an operation. If this requirement is not imposed by the tribe, the benefits of this bill will not be realized. Clearly, this is not a traditional tribal governmental function, and as such should have special funding provisions provided by the legislation.

The second requirement for capital is more complex and necessitated by the fact that most governmental contracts require surety bonds for specific performance. Performance bonds are sold

based on two principal criteria: liquid net worth and the past experience and history of the company. Both criteria would preclude most Indian-owned enterprises, tribal or individual, from securing a performance bond.

The BIA's guaranteed loan program could be used to assist, in part, with this short-fall. However, as a practical matter, this program is underutilized due to the BIA's apparent lack of understanding of business practices and venture capital lending. I am told that the Congressional mandate to the BIA to make available the $500 million allocation has gone unmet, and currently the outstanding guarantees amount to less than $200 million. I am uncertain whether this program could be used for the surety capital requirements, given the BIA's past performance and lack of enthusiasm in venture capital assistance.

The performance bond's requirement of prior experience is equally complex and condemning. There is no substitute for an excellent past performance record. Reservation based businesses are all too often limited by the market demands and lack of opportunities to be found in areas surrounding the reservations. Given the low demand for goods and services that currently exists on most reservations, a high percentage of Indian-owned businesses that do try have failed. This high failure rate results in a perception of "poor credit risk" by bankers. The absence of a strong market demand also limits a healthy track record of earnings

and experience.

I do not have all the answers to how this lack of experience can be overcome. On the Choctaw reservation we have sought business partners with technical expertise for joint venture enterprises. These relationships have worked very well at Choctaw Electronics and Choctaw Manufacturing, which produce automotive speakers and circuit boards, respectively.

As written, the language of the bill requires that the management of day-to-day activities of the enterprise be by an Indian owner or chief executive officer. Realizing the intent of this language is to restrict the enterprise from serving as a front for non-Indian operators, I think this requirement should be styled so that it will not limit tribally owned enterprises. Individually owned businesses should be required to meet this standard; however, this would adversely affect tribal governments from entering into high tech ventures.

The two joint venture partnerships that the Choctaw tribal government has established are governed by a board of directors that is Indian-controlled. The management is hired to run the day-to-day operation through policies established by the board. Without the technological expertise that these non-Indian managers bring to these ventures, these ventures would not provide jobs or profits to the reservation. In the labor pools of developing

economies, it is very difficult, if not impossible, to find qualified top level management. The key to this provision should be the question of who benefits from the profits. Without mature experienced management, it is unlikely any profits would be realized, which would result in the ultimate failure of the enterprise.

Limiting an Indian-owned enterprise to only two joint ventures appears on the surface to be prudent. However, tribally-owned or controlled ventures should not be limited to only two joint ventures, for this would unduly restrict one of the principal sources of economic development on reservations. Tribal government is typically the location of the best business minds and investment capital. In most cases that I know of, the tribally-owned ventures are limited to dispersing the profits only to the tribal government. These profits are used to either bridge a shortfall or enhance federally-funded programs.

The benefits of this bill are not questionable -- the creation of ready markets, bidding preference with a low bid allowance, and the potential for many long term socio-economic benefits. However, many tribal reservations may never realize the varied socio-economic benefits afforded by the "Buy Indian Act" due to the high front-end cost required of tribal governments and the inability of Indian-owned businesses to obtain performance bonds.

I respectfully urge this committee to consider the following in its deliberations of Senate Bill 321:

(1) Specific language to direct the Federal agencies not to restrict their procurement procedures with unnecessary requirements or complicated methods;

(2) Funding for the tribal government's compliance office or devising some other method of monitoring this activity;

(3) A provision for a waiver or reduction of the performance bond requirement for tribally-owned businesses and a directive to BIA to issue guarantees of same;

(4) Removing the requirement of day-to-day management by an Indian CEO for tribal owned enterprises;

(5) Special exemptions for tribal government joint venture enterprises that will allow for more than the proposed limit of two.

Mr. Chairman, thank you for this opportunity to address the committee and for your and the committee's support of Indian economic development efforts.

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STATEMENT OF GEORGE E. BENNETT

BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

MAY 11, 1989

Mr. Chairman, Members of the Committee, I bring you greetings from the Indian Tribes in Michigan, I am honored to address this Committee this afternoon on S. 321, which would amend the "Buy Indian" Act. My name is George E. Bennett an Ottawa Indian and Executive Director of the American Indian Business Development Consortium, Incorporated (AIBDC).

INTRODUCTION

The AIBDC is a non-profit Michigan Corporation established in 1986 and is dedicated to developing profitable businesses among the rban and reservation Indian communities in Michigan. We operate under a unique partnership of federal, state and tribal support -- for the past two years Congress has earmarked BIA funds for us which the State Legislature appropriates matching funds. We are seeking our third year of federal funding for FY 1990.

We operate according to a Seven Point Plan which is presently being used as a guide to ensure economic growth, stability and long term employment for the Michigan Indian population. For example,

in our first 18 months of operation we have created 15 new Indian-owned businesses and 86 jobs. We are presently working with the State to establish the first Indian Business Industrial Development Corporation in the nation. We are also beginning work on a Procurement Center to assist Indian-owned business secure additional government contracts, thus S. 321 will be very helpful to ensure that the "Buy Indian" Act is administered for the benefit of bonified Indian enterprises.

Our plan is unique in that it was developed in cooperation with all seven (7) Michigan Indian Tribes, urban Indian centers, private Indian entrepreneurs and the State of Michigan. We feel that this effort is a model and could be used by other Indian tribes and state governments.

The purpose of my presentation today is to support the efforts of this Committee to S.321 in revising provisions of law which provide a preference to Indian under the "Buy Indian Act Amendments of 1989."

BACKGROUND

Presently there are in excess of 61,000 Michigan Indians including both the Federally recognized tribes as well as the Chippewa, Ottawa, and Potawatomi Indians who are successors to historic tribal governments. Our population is widely distributed with twenty-three percent (23%) living on or near the reservations. The remaining seventy-seven percent (77%) reside in rural and urban

settings. The unemployment rate for Indians is approximately 50% but is reduced to about 23% through the spring and fall seasons because of seasonal employment in the tourism and agricultural industries.

In April, 1988, I was hired by the Consortium to become their Executive Director. I am a graduate of Antioch University with a B.A. in Community Studies, majoring in Economic Development. My career includes seventeen (17) years as a Production Manager for General Motors Corporation, Oldsmobile Division. In addition, my background in Indian Affairs include working in local, state, tribal, and federal governments. For fifteen (15) years prior to my present position, I worked for the U.S. Department of Housing & Urban Development. As the Director of Development and Technical Services, Office of Indian Programs in Chicago, IL, I had many opportunities to experience the inner working of Indian Preference provisions and how they are viewed from a programmatic effort within government. Therefore, I feel qualified and pleased to present my views on Indian Preference.

AIBDC RECOMMENDATIONS FOR S. 321

First, I wish to applaud the Committee for taking the initiative to strengthen the provisions for Indian Preference in problem areas which have been surfaced since the implementation of the program. Today, for the record, we wish to make comments on the Bill to further strengthen Indian Preference.

1. Advisory Committee on Indian preference:

The bill would create an Advisory Committee on Indian Preference (see page 10, line 3, (f)(1) which would consist of 10 members representing various federal agencies with an interest in Indian "Buy Indian" contracting. We recommend that the number be increased to 12 members to include the Environmental Protection Agency and the Administration for Native Americans. These two agencies provide considerable amounts of funds to Indian communities for services and program activities, some of which are contracted under Indian preference provisions. Therefore, these agencies should be directly involved in the proposed Advisory Committee.

2. Additional preference for 100% Indian-owned enterprises.

The bill would enable both 100% and 51% Indian-owned businesses to qualify as an "Indian-owned enterprise." As defined on page 8, the legislation would give equal weight to 51% and 100% Indian-owned businesses competing for construction or procurement contracts. AIBDC recognizes the difficulty faced by Indians who are developing businesses and suggests to the Committee that 100% Indian-owned and controlled companies should be entitled to a greater preference than 51% joint-ventures. Specifically, we recommend that the Committee devise a point system formula under which Indian-owned enterprises competing for contracts would be awarded an additional preference based upon the percentage of Indian ownership and control. For example, an Indian firm seeking

a contract that is 75% Indian-owned and certified as such would be awarded 75 points; a 51% Indian firm would receive 51 points and so forth.

This system would ensure added Indian Preference in determining legitimate Indian-owned enterprises and providing for equity in the bidding process and discouraging fronts.

3. Enforcement

The Consortium advocates Indian self-determination to its maximum extent; however, there are federal laws which require federal participation for enforcement. We urge the Committee to clearly require the respective federal agencies listed as members of the Advisory Committee on Indian Preference to create Contract Compliance Offices. These Offices must have clear authority to assure that preferences are enforced before, during, and after project completion. While we encourage local control and enforcement, we feel that in a number of cases, especially smaller tribes, that law enforcement is still a major problem and would require support for compliance of this law.

4. Penalties:

We would like to support the amendments which Senator McCain has proposed for penalties for violations of the preference system. These amendments would correct a major deficiency with existing law which is that there have been no penalties or deterrents for those

firms which abuse the law. We recommend that the McCain amendments be incorporated into S. 321.

Mr. Chairman, in closing we wish to thank you and the Members of the Committee for your time and consideration of our testimony and look forward to progress in Indian Preference.

STATEMENT OF
MR. DAVID GETCHES, ESQ.
AND
MR. CHARLES WILKINSON, ESQ
TO THE
SELECT COMMITTEE ON INDIAN AFFAIRS
REGARDING
S. 321, THE BUY INDIAN ACT AMENDMENTS OF 1989

We thank the Committee for the opportunity to submit this testimony. We are both Professors of Law at the University of Colorado School of Law. In addition to having written numerous studies on Indian law and on Natural Resources law, we were both members of the Board of Editors for Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.) and are co-authors of Cases and Materials on Federal Indian Law (2nd ed. 1982).

The sponsors of this legislation have concluded that the purposes of the Buy Indian Act have been substantially frustrated by fraudulent transactions in which non-Indian businesses use Indian "fronts" and gain the advantages of the Act's preferences by misrepresentation. These problems have been documented in hearings conducted by the Special Committee on Investigation held earlier this year.

These incidents defeat Congress' intention of promoting Indian economic self-sufficiency through a proper regulation of Indian commerce. Such preferential statutes have been sustained by the Supreme Court "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Morton v. Mancari, 417 U.S. 535 (1974).

In order to enforce effectively the Buy Indian Act's intent to benefit exclusively legitimate Indian-owned enterprises, we understand that further amendments to the bill by Senator McCain provide sanctions against those who fraudulently seek to use the Act. Specifically, for misrepresentation (fraud) a fine of $500,000 and/or imprisonment for up to 10 years may be imposed by federal authorities.

In addition, Indian tribes are recognized as having jurisdiction to impose civil and criminal penalties for misrepresentations under the Act. Criminal sanctions involving penalties of up to a $5000 fine or one year in jail or both. This is the same limitation on Indian criminal jurisdiction imposed by 25 U.S.C. §1302(7). This amendment to the Buy Indian Act thus delegates authority to Indian tribes to exercise criminal jurisdiction over non-Indian offenders, as well as Indian offenders, of the misrepresentation prohibition. This express delegation is necessary to effect a limited exception to the decision in Oliphant v Suquamish Indian Tribe, 435 U.S. 191 (1978), which held that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." The Committee has been asked to determine that the delegation of tribal criminal jurisdiction is necessary to achieve effective implementation and that the delegation can be exercised in a constitutionally acceptable manner. It should be noted that the federal courts have

jurisdiction to review tribal arrests of non-Indians pursuant to a write of habeas corpus. 25 U.S.C.§1303.

The Committee has determined that the delegation of tribal criminal jurisdiction as well as the other sanctions for misrepresentation in the Act are necessary to ensure that Indian tribes and tribal members exclusively benefit from the carefully targeted preference for Indian commercial enterprises.

The delegation is plainly within Congress' broad authority. Article 1, §8 of the Constitution gives Congress power over Indian affairs "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian tribes." The Supreme Court has rejected challenges to other delegations of congressional authority to tribes citing the Indian Commerce Clause. In United States v Mazurie, 419 U.S. 544 (1975), the Court upheld a delegation of authority to tribes to control the introduction of alcoholic beverages into Indian country, noting that restrictions on delegations of Congress' authority are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." Here the tribe has inherent authority to prohibit and punish identical offenses by Indian co-defendants. Congress merely seeks to enact a sanction that subjects all parties who participate in the fraudulent behavior that is the subject matter of the offense to trial in the same forum. As in Mazurie "the independent tribal authority is quite sufficient to protect

Congress' decision to vest in tribal councils this portion of its own authority "to regulated Commerce...with its Indian tribes." United States v Mazurie, supra. In Mazurie the U.S. Supreme Court recognized the authority of Indian tribes to regulate activities of Indian and non-Indian parties. In this instance, the implementation of such authority must necessarily extend beyond the reservation boundaries to be effective. However, since the federal Indian Civil Rights Act provides federal court habeas corpus review of the actions of Tribal court decisions, the rights of all parties will be amply protected in a manner that respects tribal government authority with proper checks and balances while accomplishing a very important and necessary federal purpose.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION

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June 19, 1989

Honorable Daniel K. Inouye, Chairman
Honorable John McCain, Vice-Chairman
Select Committee on Indian Affairs
Washington, D.C. 20510

RE: Buy Indian Act Amendments

Dear Mr. Chairman and Senator McCain:

The Confederated Salish and Kootenai Tribes offer the following general comments on S. 321, legislation to amend the Buy Indian Act. The Tribes are very supportive of the tenor of the bill, that being to encourage economic development by Indian tribes and Indian people. We compliment the sponsors of the legislation for supporting for the economic development and needs of Indian tribes and Indian people. We believe the legislation will promote economic opportunity on Indian reservations but that there are provisions in the bills which need amending.

The Confederated Salish and Kootenai Tribes own and operate a printing shop on the Flathead Reservation. This wholly owned Tribal enterprise is called Char-Koosta Printing and Publishing. The enterprise is a for profit business and provides employment to tribal members. The Tribes have made a substantial investment in the enterprise and through the management of Char-Koosta are constantly and aggressively searching for new markets.

Over the past few years Char-Koosta has provided some printing services to the federal government, including agencies of the Interior Department, while this work has been nominal in nature, the agencies have been pleased with the quality of service and its timeliness. However, to obtain these contracts has required Char-Koosta to wander through a maze of bureaucratic regulations. These printing contracts have been successes for Char-Koosta, but represent only a fraction of our capability. We are constantly searching for new avenues to increase our printing orders.

During the 100th Congress, the Indian Affairs Committee took the lead in amending the Buy Indian Act in a manner that

was quite beneficial to Char-Koosta and other tribally owned printing plants. The 1988 amendments, when fully implemented, will increase the printing orders we receive from the Interior Department and Indian Health Service. This amendment, which is contained in Title II of P.L. 100-581 reads as follows.

> Section 23 of the Act of June 25, 1919 (36 Stat. 8611, 25 U.S.C. 47) is amended by striking out "products" and inserting in lieu thereof "products (including, but not limited to printing, not-withstanding any other law)..."
>
> Pursuant to this amendment, the Buy Indian Act, 25 U.S.C. 47, 102 Stat. 2940, now reads as follows,
>
> So far as may be practicable Indian labor shall be employed, and the purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

The inclusion of this parenthetical amendment to the Buy Indian Act allows the Secretary of the Interior to directly contract with Char-Koosta Printing and Publishing and other tribally owned printing plants that exist in the country without having to go through the myriad of regulations used by the Government Printing Office and the Joint Committee on Printing. It is our understanding that the amendment was originally proposed by procurement personnel in the Interior Department who deal with printing and who realized the benefit to both the Department and Indian printing plants by allowing the Department the flexibility needed to deal directly with Indian printing plants. This amendment was strongly supported by the Confederated Salish and Kootenai Tribes and others who do printing for the BIA and Indian Health Service under the Buy Indian Act. We are convinced that while this amendment will boost Char-Koosta's revenue and employment opportunities by increasing printing orders from the Interior Department and the IHS, it will have an extremely insignificant effect on the total amount of printing done for the federal government.

The Tribes are now disturbed to learn that Section 2(a) of H.R. 1714, which merely restates the present language of the Buy Indian Act, has omitted the parenthetical portion of the law. We are hopeful that his exclusion is simply an oversight resultant from the very recent enactment of the law last year and its even more recent codification in Title 25. Enclosed is a copy of the present version of 25 U.S.C. 47 from the new 1989 Cumulative Annual Pocket Part of Title 25 U.S.C.. We hope the Committees will not take away the gain made in last year's amendment.

The Confederated Salish and Kootenai Tribes of the Flathead Reservation urge that you work off of the most recent version of the Buy Indian Act in dealing with the proposed 1989 amendments and that you keep the 1988 printing language intact. Please don't change a good thing. Again, we are presuming that the omission of the parenthetical language was inadvertent. However, if it was intentional and reflects pressure on the Indian Committees from the Joint Committee on Printing or the pressure on the Interior Committee from the Joint Committee on Printing, our feeling is that it's too late to change the 1988 amendments. If the JCP can demonstrate any harm to the United States from last year's language, we would like to first, see proof of it, and secondly, have them, not you, take the lead in amending the 1988 amendment. (We have recently learned that the GPO had no objection to the 1988 Amendment and subsequent to its passage, approached the BIA regarding cooperative efforts needed to implement it.) The intent of H.R. 1714 is to increase federal contracting to Indian owned business. In the same well-intentioned law, please don't detract from our chances of additional government contracting because of congressional turf issues.

While we have not seen the language of the amendment, we understand that the Justice Department may be proposing an amendment that will restrict the nature of contracting allowed from a federal agency to a tribe for hiring expert consultants and witnesses for use in natural resource litigation undertaken by the United States. This sounds like an attempt to make statutory, the paternalistic policy of prohibiting the contracting of consultants and experts by tribes involved in water rights litigation. This practice of the Reagan Administration was soundly criticized in a bi-partisan fashion in past Congresses and specifically overturned by annual language in the Interior Appropriations bills. It is an insult to the sovereign nature of the Confederated Salish and Kootenai Tribes to intimate that we don't have the knowledge and wherewithal to hire technical experts in these fields for litigation purposes and that we can instead, only use those firms that are on the Justice Department's list. (It is noteworthy that many tribes have found DOJ preferred contractors to be from firms that will make conservative water claims possible on behalf of the tribe it supposedly is representing as a trustee.) If DOJ can demonstrate to a tribe that a proposed contractor is incapable of properly carrying out its work, we believe tribes will listen closely to such advice but to statutorily prohibit us from doing it, is inconsistent with the government-to-government relationship that has been universally espoused by the Congress, the courts, and by the present and previous Administrations.

Section 2(c)(2) of H.R. 1714 proposes to expand the breadth of the Buy Indian Act to federal agencies other than the Indian Health Service and the Department of the Interior. We strongly support this provision but question whether the vehicle chosen to do this, Title 25, is such that other (non-Interior) agencies may challenge the applicability of provisions of Title 25 as its application is limited to the Interior Department and the Indian Health Service. We realize that you don't want Committees with jurisdiction over the bill and therefore we are simply flagging this concern and would urge the strongest possible report language to address the potential of other agencies challenging your intent.

Section 2(c)(1) is apparently intended to apply to the primary agencies with Indian programs and (c)(2) to agencies that may contain programs benefitting tribes. As drafted, we are concerned that the phrase "administering funds appropriated for the benefit of Indians" in (c)(1) may be viewed in the most restrictive sense by agencies not inclined to work toward implementing Indian preference in contracting. For instance, are programs that benefit Indians in the Agriculture or Commerce Departments or the Environmental Protection Agency "appropriated for" for the benefit of Indians, or do they simply benefit Indians? Are we going to have to prove the intent of the Congressional Appropriations Subcommittees to implement this section for agencies other than BIA and ANA? The language in (c)(2) provides that the Secretary "may" authorize a preference when the agency will exercise the self-initiative to make such a request. Since agencies will not, in all probability, request a preference award, the burden then falls on the Indian enterprise to pressure the agency to make such a preference request.

Additionally, while the provisions of (c)(2) which indicate that the Secretary may authorize Indian preference in contracting and which, presumably, are intended to apply to those agencies whose primary mission isn't helping Indians, might not the language in (c)(2) actually take away what the language in (c)(1) granted? At the very least, the word "also" should be added after the word "may" on line 3 of page 4 to distinguish between (c)(1) and (c)(2). Furthermore, (c)(2) will allow for such preferential treatment if the Secretary believes that preferential contracting will help fulfill the responsibility of the agency doing the contracting. Perhaps this should be changed to the special responsibilities of the "United States" toward Indians.

The Tribes note that language in H.R. 1714 at §2(d)(1)(C) on page 7 states that for purposes of determining ownership that

the interest of an Indian tribe shall constitute an ownership interest of an Indian. This language is helpful and should be incorporated into S. 321. Additionally, businesses that are owned by Indian tribes ought to be able to have non-Indian CEO's without losing their preferential status. That hiring responsibility is properly the prerogative of a tribal government.

We are concerned that the creation of the Advisory Committee on Indian Preference, while conceptually satisfactory, will take some time to set up and then become operational. During this interim period the Tribes see the need for some method whereby Indian tribes and Indians owned businesses can obtain a preference for contracts.

We would ask the Committee to give consideration to the inter-relationship between H.R. 1714 and the new regulations proposed by the Small Business Administration relative to Indian owned businesses obtaining 8(a) status. Among other things, the new SBA regulations encourage joint ventures between non-Indian and Indian owned firms. We ask the Committee to consider what results may come from the provisions of H.R. 1714 changing the definition of an Indian owned construction firm from its present 51% to the proposed 100% when at the same time there are benefits proposed by SBA to joint venture. Are there conflicts here that have not been considered? Additionally, we are concerned that if the Congress is going to insist on 100% Indian ownership provision for construction firms, that you deal with the fact that such businesses are going to have a very difficult time getting bonded. It is often through the association with an existing non-Indian company that Indian construction firms get through their bonding capability.

We strongly endorse the creation of the Advisory Committee on Indian Preference and the requirements that Indian owned businesses be certified as truly being Indian owned. We would recommend that this Committee and/or the agencies that comprise it have investigatory divisions and enforcement and compliance components with punitive authority. The creation of the Committee itself without assurances and the power that it can weed out the front groups is insufficient to ensure that the intent of the act is carried out. The Inspector General's at various agencies should be brought into the bill to aid in enforcement. On the other side of the coin, the bill is silent on what recourse is available to Indian owned businesses that have bid on a contract in which the agency should have been supporting Indian preference but did not. Perhaps the Advisory Committee could serve as an appeals board in these instances.

Again we commend the Committee and its leaders for proposing this legislation and volunteer the use of our staff and Council if we can be of any use to the Committee in dealing with this legislation.

Sincerely,

Michael T. Pablo, Chairman
Confederated Salish and
Kootenai Tribes

MTP:asm

Enclosure:

Codification. Section is from Title I, § 100, of the Department of the Interior and Related Agencies Appropriations Act, 1985, as enacted by section 101(e) of Pub.L. 98–473.

Legislative History. For legislative history and purpose of Pub.L. 98–473, see 1984 U.S. Code Cong. and Adm. News, p. 3182.

§ 17. Use of Bureau facilities

(a) In general

The Secretary of the Interior may permit tribal governments and organizations and student organizations to use Bureau of Indian Affairs equipment, land, buildings, and other structures if such use does not interfere with the purpose for which they are administered by the Bureau and when such use benefits Indians or Federal or federally funded programs. The Secretary may charge the user for the cost of the utilities and other expenses incurred for the use. The amounts collected shall be credited to the appropriation or fund from which the expenses are paid and shall be available until the end of the fiscal year following the fiscal year in which collected. The Secretary's decision to not permit a use under this section is final and shall not be subject to judicial review.

(b) Scope of authority

The authority provided by this section is in addition to, and not in derogation of, any other authority available to the Secretary of the Interior.

(c) Limitation of liability

The payment of any fee, or agreement to pay costs, to the Secretary shall not in any way or to any extent limit the right of the United States to rely upon sovereign immunity or any State or Federal statute limiting liability or damages from injuries sustained in connection with use under this section.

(Pub.L. 100–297, Title V, § 5405, Apr. 28, 1988, 102 Stat. 417, amended Pub.L. 100–427, § 25, Sept. 9, 1988, 102 Stat. 1613.)

1988 Amendment. Subsec. (a). Pub.L. 100–427, § 25(a), substituted "The Secretary of the Interior may permit tribal governments and organizations and student organizations to use Bureau of Indian Affairs equipment, land, buildings, and other structures if such use does not interfere with the purpose for which they are administered by the Bureau and when such use benefits Indians or Federal or federally funded programs" for "The Secretary of the Interior may permit tribal, student, and other non-Federal organizations to use facilities, lands, and equipment administered by the Bureau of Indian Affairs if such use does not interfere with the purpose for which the facilities, land, and equipment are administered by the Bureau" and "The Secretary may charge the user for the cost of the utilities and other expenses incurred for the use" for "The Secretary of the Interior may charge the user for the actual or estimated additional cost of utilities or other expenses incurred because of the use and the amounts collected shall be credited to the appropriation or fund from which the expenses are paid" and added sentences directing that the amounts collected be credited to the appropriation or fund from which the expenses are paid and be available until the end of the fiscal year following the fiscal year in which collected, and that the Secretary's decision to not permit a use under this section be final and not subject to judicial review.

Subsec. (c). Pub.L. 100–427, § 25(b), added subsec. (c).

Effective Date. Section effective July 1, 1988, but with provisions which authorize appropriations for fiscal year 1988 to take effect Apr. 28, 1988, see section 6303 of Pub.L. 100–297, set out as a note under section 2701 of Title 20, Education.

Legislative History. For legislative history and purpose of Pub.L. 100–297, see 1988 U.S. Code Cong. and Adm.News, p. 101.

CHAPTER 2—OFFICERS OF INDIAN AFFAIRS

Sec.
47a. Security required by Secretary; contracts with Indian-owned economic enterprise; public work.

§ 47. Employment of Indian labor and purchase of products of Indian industry

So far as may be practicable Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

(As amended Nov. 1, 1988, Pub.L. 100–581, Title II, § 206, 102 Stat. 2940.)